House
Legislative
Analysis
Section

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REVISE DRAIN CODE

House Bill 4803 (Substitute H-2)
First Analysis (12-7-99)

Sponsor: Rep. Mike Green
Committee: Agriculture and Resource Management

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) was being hindered by malaria, which was spread by mosquitos that bred in the state's wetlands. Although drain law has authorized the construction and maintenance of 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 until the post-war boom in suburban development, economic development under the Drain Code has primarily been agricultural.

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 it 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), attempts at a comprehensive revision of the entire Drain Code have not been successful.

THE CONTENT OF THE BILL:

The bill would revise the Drain Code of 1956, in general to update, combine, and consolidate many of the code's current provisions. The bill also would make a number of changes to the current process for initiating, maintaining, and paying for drains, as well as making numerous technical revisions.

In brief, the following are some of the proposed changes to the Drain Code:

Terminology

** Throughout the bill, current Drain Code language

that refers to "drain taxes" would be replaced by language referring instead to "special assessments."

** Throughout the bill, language currently referring to the "necessity" of drains in terms of "public health, convenience, and welfare" would be replaced with current language identical to that in the chapter on water management (chapter 22), which refers to "necessity" based on "public health, safety, or welfare."

** A second definition of "benefit" (a term which is used in making special assessments for drain work) would be added to the beginning of the Drain Code (in addition to the current definition in Chapter 22, which would itself be rewritten).

Drain commissioners

** Drain commissioners, with county approval, would be able to impose and collect additional drain assessments for their (and their staffs') professional development and additional fees for various reviews and inspections added to their powers and duties.

** Drain commissioners would be given the authority -- and would be required -- to review all municipal projects affecting storm water run-off into drains, as well as any other requests to discharge into, connect to, or cross an existing drain. [Section 34]

** Further protections to drain commissioners' salaries and fringe benefits would be added.

Petition process

** The number of petitioners for a drain project would be decreased from "10 freeholders" to "5 landowners" or landowners representing 25 percent of the lands potentially liable for assessment, while the amount of tax delinquent land in a proposed drainage district that would disqualify a petition would be decreased from one third to one fourth.

** Notification of all public meetings or hearings under the Drain Code would have to be given both by first-class mail and publication in a newspaper of general circulation, and verbatim transcripts would have to be made of all such meetings or hearings.

** All boards of determination meetings would have to have official, verbatim records.

** Individual petitioners, landowners in proposed drainage districts, or the county, would have to pay for costs of the process involved in petitions for drains that are dismissed or rejected.

** In addition to private landowners, state departments or agencies (including colleges and universities), junior or community colleges, school districts, and municipalities (under a new definition of "public corporations") also would be subject to special assessments for drain projects.

** The decision-making process on requested drain projects would have to include a "preliminary analysis" (instead of the current "survey") that would be presented at a public hearing.

** The circuit court would serve as the court of appeal to review whether a board of determination's "order of necessity" (i.e., decision whether a drain project was necessary for "the public health, safety, or welfare") or dismissal of a drain petition was lawful and supported by evidence on the record only.

** Drain projects with an estimated cost of less than $10,000 would not have to be let for bidding (the current ceiling is $5,000), and drain commissioners or drainage boards could spend up to $5,000 (instead of the current $2,500) per mile or fraction of a mile in any single year for drain maintenance or repair without a petition from landowners and without first notifying affected landowners.

** Boards of determination would determine the "necessity" of a petition (in terms of the "public health, safety or welfare" instead of "public health, convenience and welfare") of a petitioned drain, while drain commissioners would continue to determine the "practicability" and scope of proposed drainage projects.

Other provisions

** There would be new general requirements on drain commissioners, drainage boards, and the director of the Department of Agriculture as part of any drain construction or improvement project, including water quality protection, minimizing the impacts of drain work on land (including land for preservation or conservation), evaluation of the effects of projects on natural resources (and identification of ways to minimize adverse effects), and obtaining any permits required under the Natural Resources and Environmental Protection Act [section 3(2)];

** References to nonbinding consideration of "natural resource" enhancement and improvement would be added to the Drain Code for the first time [see section

51(3), on petitions].

Some of the bill's provisions are described in more detail below.

Definition of "benefit." Currently, Chapter 22 of the Drain Code ("Water Management. Districts and Subdistricts") defines "benefit(s) to mean "advantages resulting from a project to public corporations, the inhabitants of public corporations, and property within public corporations," and further specifies that the term "shall be limited to benefits which result from the drainage and control of water, and shall include such factors as: elimination of flood damage; elimination of water conditions which jeopardize the public health and safety; increase of the value or use of lands and property arising from improved drainage and elimination of floods; and the advantageous use to which water may be directed as a result of the project, and incidental thereto, for agricultural, conservation and recreational purpose." [Section 551(j)] The bill would rewrite this definition for the newly rewritten and retitled "Watershed Management" chapter, and would add a second, different definition of "benefit(s)" to the first chapter of the code.

The bill would keep much of the current definition of "benefit(s)" in chapter 22 but, among other things, would eliminate reference to "conservation" as one of the purposes for which "the advantageous use to which water may be directed as a result of the project." More specifically, the bill would define "benefit(s)" in chapter 22 to mean "the advantages resulting from a plan or project to public corporations, the residents of public corporations, and property within public corporations." "Benefits" would include, but not be limited to, benefits that resulted "from the management and control of water, such as elimination or reduction of flood damage, elimination or reduction of water quality conditions that jeopardize[d] the public health, safety, or welfare, increase[d] the value or use of lands and property arising from improved water quality, increased usefulness of the water for agricultural or recreational uses, reduction of flooding, improved drainage, and remedying a public corporation's contributions to the condition that ma[d]e a plan necessary."

The bill also would define "benefit," a term used to determine how special assessments for drain projects are assigned to landowners, in chapter one of the Drain Code to mean "advantages resulting from a project to public corporations, the residents of this state, and property within this state." In this chapter one definition, "benefit(s)" would include both positive and negative impacts of drain projects. Specifically, the bill would include as "benefit(s)," upon which special drain assessments would be based, "advantages that result from elimination of pollution and elimination of flood damage, or elimination of water conditions that jeopardize the public health or safety; increase *or decrease* of the value or use of lands and property resulting from the project; and the positive *or negative* consequences of the project for individual parcels of land including, but not limited to, all of the following: (I) increase *or decrease* in natural resource values. (ii) increase *or decrease* in flooding. (iii) the amount and quality of runoff from land entering a drain as determined by factors including, but not limited to, the following: (a) The depth, character, and quality of surface and subsurface soils of the land. (b) The amount of impervious surface on the land. (c)Whether the act or omission of a person increases or decreases the need for the project or improves or degrades the water quality" (emphasis added). [Section 12(b)]

Authorization for drains, improvements, and maintenance. Currently, the Drain Code authorizes the establishment, construction, and maintenance of drains whenever these activities "shall be conducive to the public health, convenience and welfare." More specifically, the current Drain Code allows all of the following activities by petition under Drain Code whenever the activities are conducive to the public health, convenience and welfare":

(1) The location, establishment, construction, and maintenance of drains ("including branches");

(2) The cleaning out, straightening, widening, deepening, extension, consolidation, relocation, tiling, connection, and relocation along a highway of "existing drains, creeks, rivers and watercourses and their branches or tributaries" (whether located, established and constructed by a county drain commissioner or drainage board or by a city, village or township);

(3) The provision for existing drains of "structures or mechanical devices that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relieve" a drain's flow; and

(4) The addition of one or more branches to an existing drain. [Section 2]

The bill would strike the current language and replace it with language authorizing drains to be "established, constructed, maintained, and improved consistent with" the bill's provision. [Section 3(1)] The bill also would redefine "drain" and explicitly define for the first time

(drain) “improvement” and “maintenance”.

Currently, Section 3 of the Drain Code defines “drain” to include “the main stream or trunk and all tributaries or branches of any creek or river, any watercourse or ditch, either open or closed, any covered drain, any sanitary or any combined sanitary and storm sewer or storm sewer or conduit composed of tile, brick, concrete, or other material, any structures or mechanical devices, that will properly purify the flow of such drains, any pumping equipment necessary to assist or relieve the flow of such drains and any levee, dike, barrier, or a combination of any or all of same constructed, or proposed to be constructed, for the purpose of drainage or for the purification of the flow of such drains, but shall not include any dam and flowage rights used in connection therewith which is used for the generation of power by a public utility subject to regulation by the Public Service Commission.”

Under the bill, a "drain" would mean any of the following if established under the Drain Code:

(1) the main stream or trunk or a tributary or a branch of a creek or river;

(2) a watercourse or ditch, either open or closed;

(3) a covered drain;

(4) a sanitary or a combined and sanitary and storm sewer or storm sewer or conduit;

(5) a structure or mechanical device to purify or improve the flow of a drain;

(6) pumping equipment necessary to assist or relieve the flow of a drain;

(7) any dam, levee, dike, or barrier for drainage or to purify or improve the flow of a drain; and

(8) storm water storage, detention, or retention facilities.

The bill would strike current language describing what generally covers drain maintenance and improvement activities, and would instead explicitly define these activities as follows:

“Improvement” (and “improve”) would refer to any of the following with respect to a drain (or portion of a drain) that had actually been constructed or established:

(1) relocating, widening, deepening, straightening, tiling, extending, or adding branches to a drain;

(2) providing dams, levees, dikes, barriers, structures, or mechanical devices that would properly purify, control, or improve the flow of a drain; and

(3) providing pumping equipment or constructing relief drains necessary to assist or relieve the flow of a drain.

“Maintenance” (and “maintain”) would refer to any of the following, if within the capacity of a drain previously established or constructed:

(1) Maintaining a drain or drains in working order to continue a normal flow of water, including but not limited to the maintenance, repair, or replacement of, and utility service for, pumping stations, sewage treatment facilities, or mechanical devices;

(2) Cleaning out a drain or drains;

(3) Keeping a drain or drains free from rubbish, debris, siltation, or obstruction;

(4) Repairing a portion or all of a tile, drain, or drains to continue the normal flow of water;

(5) Restoration of previously established depths, bottom widths, and grade based on records maintained at the office of the drain commissioner;

(6) Erosion repair and control;

(7) Erosion and sedimentation control;

(8) Maintenance, repair, or replacement of levees, dikes, dams, and retention and detention basins;

(9) Maintenance, repair, or replacement of structures, such as bridges, culverts, or fords, that had diminished the capacity of the drain or that were or might become unstable or unsafe;

(10) Removal and disposal of contaminated material;

(11) Removal of obstructions downstream for the purpose of restoring adequate outlet for lands within an existing drainage district or districts or (under section 422) on property not within a drainage district to remove or modify an obstruction in a natural watercourse that was not itself a drain but that served as an outlet for a county or intercounty drain;

(12) Any “activities” associated with maintenance described in the above list; and

(13) Activity under Part 91 of the Natural Resources and Environmental Protection Act.

The bill would add a definition of "project," which would mean "work undertaken as a result of a petition and order of necessity or undertaken as maintenance on a drain" under the bill, and would replace current language that refers to "public health, convenience, and welfare" throughout the Drain Code with the phrase "public health, safety or welfare."

New general requirements. As part of any drain construction or improvement project, each drain commissioner, each drainage board, and the director of the Department of Agriculture would be required to do all of the following:

(1) Protect water quality, headwaters, main branches, and tributaries and the hydraulic capacity of floodplains and floodways.

(2) Avoid, minimize, and mitigate impacts of new drains, improvements, and maintenance on land or interests in land, including, but not limited to, easements, owned for preservation or conservation purposes by a public corporation or private nonprofit organization.

(3) Incorporate flow patterns into criteria for drain design and storm water management.

(4) Make on-site retention and detention of storm water a priority.

(5) Use applicable management practices adopted by the Commission of Agriculture. The commission would be required to adopt management practices within two years after the bill took effect. The commission would have to adopt, and could revise, the management practices after both (1) consulting with the Department of Natural Resources (DNR), and Department of Environmental Quality (DEQ), and “interested” drain commissioners, and (2) holding at least one public hearing with appropriate public notice.

(6) Evaluate the impacts of the project on natural resources and identify appropriate measures to minimize adverse impacts.

(7) Obtain any permits required under the Natural Resources and Environmental Protection Act. [section (3)(e)]

Preservation of existing drains; easements and rights-of-way. The bill would rewrite current language preserving existing drains, easements, and rights-of-way. Currently, a drain “regularly located and established in pursuance of law existing at the time of location and establishment” and “visibly in existence” -- as well as all drains “visibly in existence” only in “written drain documents, or rights of way” on file in the drain commissioner’s office -- are deemed “public drains” and their public easements and rights-of-way remain valid through subsequent changes in ownership of the land. The bill would rewrite this section to specify that a drain was a public drain and presumed to have been established by law if the drain either (a) was “regularly located and established under law in effect at the time of establishment and visibly in existence” or (b) if the drain was “visibly in existence in written drain easements, rights-of-way, order, or other records, such as maps, engineering plans, survey or construction records, or apportionment, assessment, or procedural records, on file in the office of the drain commissioner.” The easements and drains will be presumed to have been located in public easements or rights-of-way with regard to possible subsequent landowners. [Section 6]

Acquisition of property. The bill would explicitly authorize drain commissioners and drainage boards to acquire property or a property interest, “including, but not limited to, land, easements, and rights of way, by gift, grant, dedication, purchase, or condemnation under the Uniform Condemnation Procedures Act.

A release of right-of-way negotiated by a drain commissioner after the bill took effect would have to describe the land to be conveyed, “including ground necessary for the deposit of drainage excavations.” If a portion of a drain were located within a roadway or public place, a resolution (granting leave to construct the drain and designating the place to be crossed by the drain) of the roadway authority or the governing body having jurisdiction over the public place would be a sufficient release of the right-of-way under the bill. A drain could be laid within or across a roadway right-of-way if the drain commissioner or drainage board obtained a permit from the roadway authority.

Statutory authority to acquire land for drains. The bill would specify that for the purposes of the Drain Code, a drain commissioner or drainage board could acquire property or a property interest -- including, but not limited to, land, easements, and rights of way -- by gift, grant, dedication, purchase, or condemnation under the Uniform Condemnation Procedures Act. [Section 7(1)]

If the federal government participated in a drain project, it could acquire property or a property interest for the project under applicable federal law. The cost for the federal government to acquire the property or a property interest would be considered a part of the cost of the project as if it had been acquired by the drain commissioner or drainage board unless the drain commissioner or drainage board had contracted otherwise with the federal government under section 431 of the bill. [Section 7(2)]

Office of drain commissioner. The bill would make a number of changes or additions to the chapter of the code dealing with county drain commissioners (chapter 2). Among other things, the bill would:

** increase the amount of the individual surety bond for a drain commissioner, and the amount of the individual bond for a deputy drain commissioner, from the current maximum of $5,000 to a maximum of $100,000 [sections 21(2) and 24(2)];

** to the extent authorized by the drain commissioner, allow deputy drain commissioners to execute the powers and duties of a drain commissioner [section 24(2)];

** delete the requirement that the deputy drain commissioner make monthly and annual reports to the drain commissioner of all work performed by the deputy drain commissioner [section 26];

** expand the current list of supplies and equipment (to include, among other things, word processing equipment) that the county would have to provide to the drain commissioners' offices [section 27(1)] ;

** eliminate the requirement for drain commissioner office hours (which currently require that the drain commissioner be in his or her office at least one day a week) [section 27(1)];

** allow the office of the drain commissioner to be kept at "an official county facility" (instead of, as currently, at the county seat) [section 27(2)];

** allow a drain commissioner to levy, with the approval of the county board of commissioners, an additional annual one percent assessment on lands in each drainage district for the professional development of the drain commissioner and his or her staff [section 27(3);

** add a requirement that drain commissioners receive fringe benefits ("if any"), in addition to an annual salary, as determined by the county board of commissioners, to be paid from the county general fund in the same manner and at the same time as those of other county officers, and prohibit decreasing a drain commissioner's fringe benefits during his or her term of office to a greater extent than the fringe benefits of elected county officials in general were decreased [section 28(1)];

** prohibit decreasing a drain commissioner's salary during successive terms of office more that the salaries of other county officials were decreased [section 28(1)];

** require the drain commissioner's office to furnish to any person ("who may so desire") documents as might be required to implement the act's procedures (currently, the drain commissioner is required to "furnish upon request blank applications or petitions to any person who may desire to file the same under this act"), and authorize the drain commissioner to assist in the preparation of such documents "as may be required to implement the procedures of this act" [section 29];

** eliminate the current requirement that the drain commissioner make an annual report about the drainage districts (including a full financial statement of each drainage district) and drain work to the county board of commissioners, and instead require that a report by the drain commissioner be submitted only upon the request of the "legislative body of a municipality" [section 31;

** authorize and require drain commissioners to review, inspect, and analyze construction or other activity by a municipality that may have a significant effect on the quantity or quality of water entering a drain or on the hydrology of a drain, and require municipalities to notify the drain commissioner if the municipality determined that construction or other activity it had the authority to approve might have a significant effect on a drain [section 34(1)];

** allow drain commissioners to propose, and the county board of commissioners to adopt, ordinances establishing schedules of fees "attendant to the review, inspection, or analysis of proposed municipal construction that might significantly affect a drain or fees for the review or inspection of any discharges, connections, or drain crossings, plus penalties for noncompliance [section 34(1) and (2)];

** require drain commissioners to review, and allow them to approve, all requests to discharge into, make a connection to, or construct a crossing of any established drain [section 34(2)];

** allow drain commissioners to establish fees for other reviews and inspections required of them by county boards of commissioners or by other laws (including the Land Division Act, the Mobile Home Commission Act, and the Condominium Act), though such rules and schedules of fees could not take effect unless approved by the county board of commissioners [section 34(3)];

Proposed process for new drains. The bill would create a new, single-step petition process, in place of the current two-step application and petition process, for simultaneously establishing new drainage districts and new drains. The basic process would be similar for both county drains and drain commissioners (Chapter 3) and for intercounty drains and drainage boards (Chapter 5).

Current application and petition process for a new drainage district and a new drain. Currently, an application for a new drain project is a two-step process. First, under chapter 3 of the Drain Code, those asking for a new drain must submit an "application" to lay out and designate a drainage district. This application must tentatively describe the location and route of the proposed drain, and must be signed by at least 10 "freeholders" (though the Drain Code does not define "freeholder," the term "freehold" refers to an interest in real estate without a predetermined time span) whose land would be in the proposed drainage district, and at least 5 of whom would be subject to an assessment for the proposed drain. If the drain commissioner determined that the proposed drainage district might not include 20 freeholders whose lands would be liable for an assessment, the application for establishing a drainage district would be received if any one of the signers is a freeholder who would be liable for assessment for the construction of a proposed drain.

The drain commissioner decides whether or not the application signers are eligible to sign the application, and the board of determination appointed by the drain commissioner can instruct the drain commissioner to refuse an application to lay out a drainage district unless a cash deposit, sufficient to cover the preliminary costs, accompanies the application. If the proposed drain is completed, the cash deposit is returned to the depositors out of the first tax collection on the drain; if the drain is uncompleted, any excess above costs is returned. Alternatively, a county public health department or a city, village, or township can sign an application for a drainage district if the proposed drain is necessary for the public health (and, in the case of cities, villages, or townships, if they would be subject to an assessment at large for a percentage of the cost of the proposed drain. When an application for a new drainage district is filed, the drain commissioner must "immediately" cause a survey, by a competent surveyor or engineer, to be done in order to determine the area that would be drained by the proposed drain and the "most serviceable" route and type of construction of the drain(s), though the drain commissioner is not limited in making that determination by the route described in the application. The surveyor or engineer authorized to make the survey must ascertain the size and depth of the drains; prepare preliminary plans, drawings and profiles of the drains; compute the yards of earth to be excavated, the amount of tile or pipe to be used and the necessary bridges and culverts or fords to be built; and estimate the cost of the construction. He or she then lays out a drainage district. In doing so, he or she is not limited to the route described in the application, but may recommend a route and type of construction for the proposed drains he or she considers most serviceable for draining the area involved.

The drain commissioner decides whether a proposed drain would be "practical" or "impractical." If the drain commissioner decides, before or after the survey, that the proposed drain would be "impractical," he or she notifies the applicants in writing of his or her decision and his or her reasons for that decision of "impracticability,"and takes no further action at this point. If the drain commissioner decides that a proposed drain would be "practical," he lays out a drainage district, prepares and files in his or her office a description of the drainage district, and contacts the county treasurer to determine whether or not at least a third of the land in the proposed drainage district is tax delinquent. If it is, no further action on the application is taken.

The drain commissioner prepares and files in his or her office an order designating a drainage district, giving it a number and describing the district and the drains ("as determined by him"), showing the beginning, route, terminus, type of proposed construction, and the estimated cost of the proposed construction. The drain commissioner also must give notice of the filing of an order designating a drainage district by publishing a notice in a newspaper of general circulation in the drainage district. The notice must give a general description of the proposed drain route and of the drainage district as shown in the order. (The name or number of the drain may be changed by a petition signed by at least 5 landowners whose lands would be traversed by the proposed drain(s), if, in the drain commissioner's opinion, it is "to the best interest of all concerned" that the name or number be changed.).
Under the current Chapter 4 of the Drain Code, after a drainage district has been established and the order for it

filed in the drain commissioner's office, a petition to "locate, establish and construct" a drain may then be filed with the drain commissioner having jurisdiction over the lands designated in the order establishing the drainage district. This second petition must be signed by half of the freeholders whose land would be traversed by the proposed drain(s), and has to be accompanied by a description of the land owned in the drainage district by each petition signer along with a certificate saying that there are no taxes or special assessments unpaid for the past three years on any of the lands described in the attached list. If the land owned by any of the signers is tax delinquent for three years, that signer's signature does not count. The drain commissioner determines the eligibility of the petition signers.

Proposed petition process for a new drainage district and drain. The bill would revise this two-step application and petition process, repealing chapter 4 of the Drain Code (which lays out procedures for the petition to "locate, establish and construct" a drain once the application under chapter 3 to establish a drainage district has been accepted and the drain commissioner has filed an order designating a drainage district), and consolidating this two-step process into a single petition to simultaneously initiate both the establishment of a drainage district and the establishment and construction of a county drain.

** The proposed petition would have to set forth the reasons for the request, and could (1) propose a location and route for the proposed drain (instead of, as currently, being required to do so) and (2) request that measures be undertaken which were intended both to enhance or improve the natural resource values of the proposed drain and which provided direct benefit to the designed function, longevity, or hydraulic capacity of the proposed drain. In the case of intercounty drains, the petition would have to describe the nature and extent of the water problem to be remedied, in addition to setting forth the reasons for the request.

** Instead of requiring the signatures of ten "freeholders," five of whose land would be subject to assessment, on the application to establish a drainage district, and requiring the signatures of half of the freeholders whose lands would be traversed by the proposed drain on the petition to establish a new drain, the single petition under the new process would have to be signed by five "landowners" in the proposed drainage district whose lands would be subject to assessment, or, alternatively, by landowners representing 25 percent of the land area liable for assessment.

** The amount of tax delinquent land in the proposed drainage district that would disqualify a petition would be reduced from one-third to one-fourth.

** Individual petitioners, landowners in a newly established drainage district, or counties would have to pay for the costs of the petition process when petitions for drains were dismissed.

** All hearings of boards of determination would have verbatim transcripts.

** In addition to private landowners, "public corporations" also would be assessed for drain projects. "Public corporations" would include state departments or agencies, colleges, universities, legally-created "authorities," junior or community colleges, school districts, and municipalities.

** A public corporation or other aggrieved person could appeal to the circuit court to review a board of determination's "order of necessity" or "order of no necessity." The circuit court would base its review on the record presented to the board of determination, and no additional testimony or information would be allowed (except for purposes of claim of fraud or error of law). The circuit court would determine whether the board of determination's order was authorized by law and supported by substantial, material, and competent evidence on the whole record.

** After a drain commissioner filed a first order of necessity, he or she would have an engineer prepare an "engineering analysis" that included a hydrologic and hydraulic report; recommended route and course; existing and proposed profile of the recommended route and course; a description of the recommended work, of the drainage district, and of the alternatives considered; an estimate of the cost of construction; an analysis of the effectiveness of the proposed project to address the conditions that it was intended to remedy, create, or enhance; a maintenance plan for the drain; an evaluation of the impacts of the project on natural resources that identified appropriate practical measures to minimize adverse effects; and any other information requested by the drain commissioner.

** If a board of determination determined that a drain were "necessary and conducive to the public health, safety, or welfare or for agriculture," the drain commissioner would have to convene an informational meeting to provide or elicit information and testimony

about the route and type of construction and estimate of the cost. The information would be to assist the drain commissioner in determining the scope of the drain project.

** The drain commissioner could include, at his or her discretion and as part of the drainage project, measures intended to enhance or improve natural resource values that didn't benefit the drain, but funding for such measures would not come from drain assessments.

** After receiving the final plans prepared by the engineer, the drain commissioner could decide that a project wasn't "feasible" and would have to hold a public hearing (with appropriate notification) to hear objections to the drain commissioner's rejection of the petition.

** After receiving the engineering analysis, the drain commissioner would have to convene a hearing to present and receive testimony and other evidence on the engineering analysis and the proposed project. The drain commissioner would have to consider the testimony and evidence offered at the public hearing, and would decide the route and course, type of construction, and other features of the drain.

** Unless the drain commissioner determined to reject a petition, he or she would proceed to acquire property for the drain, prepare and file a "final order of determination" establishing the drain, and conduct the apportionment and review of benefits, the letting of contracts, and the levy and collection of "drain special assessments" as provided for in the bill.

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.

Drainage laws in other states. A Legislative Service Bureau memorandum dated 9-20-99 examined the drainage laws of neighboring Midwestern states and Florida, one of the few states with more wetlands than Michigan. According to the memorandum, in *Minnesota*, the county board of commissioners is the primary drainage authority or, in areas where a watershed district has been established, the watershed district board of managers. The drainage authority's attorney reviews petitions for adequacy, and if the petition is adequate, the drainage authority appoints an engineer who prepares a preliminary engineering analysis surveying the project and estimating costs. In *Ohio*, the county board of commissioners also makes all final decision on drainage projects, while the county engineer carries out the technical aspects of a project, including preparing a preliminary report on the estimated costs and benefits of the project and its feasibility, preparing a schedule of assessments that estimates the benefits to all public and private landowners, and, if a project is approved, receives bids. In *Wisconsin*, there are about 200 active drainage districts in 30 counties, with the authority for the management of drainage districts resting with a three-member county drainage board -- consisting of an experienced farmer, someone with experience in drainage engineering, and a third person -- appointed by the circuit court from a list of appropriate candidates provided by the agricultural extension service. In *Florida*, one of the few states with more wetlands than Michigan, regional water management law has superseded most of Florida's local drainage statutes. The governor, with Senate approval, appoints seven-member boards to govern each of the five "water management districts" which cover the entire state and which have been created based on water drainage patterns. The water management district boards administer flood protection programs, development of water management plans, and regulate the consumptive use of water, aquifer recharge, well construction, and surface water management through a permitting process. All water management district activities are funded by taxes levied for that purpose. In the approximately 30-40 remaining active "water control districts" (since 1980, new water control districts may only be created by special acts of the legislature), landowners in the district elect three-member Boards of Supervisors to govern the district. In consultation with an appointed district engineer, the board develops and implements a water control plan that includes construction and maintenance of public drains, and may collect assessments for construction as well as an annual maintenance tax from all landowners, including the state of Florida.

With regard to the issue of oversight of drain projects, in *Minnesota*, the Minnesota Department of Natural Resources (MDNR) reviews the preliminary engineering analysis (which is required to consider engineering, economic, and environmental issues) and provides comments in an "early environmental review." Before a drainage authority can approve a project, Minnesota further requires a "viewers' report" (which determines the benefits and damages from the project to each landowner), a "property owners' report" (which apportions the benefits and damages), a "final engineering report", a "final advisory report" by the MDNR, and a final public hearing. Even then, a project can be approved only if it is "practical" (which involves considering land use and environmental criteria), the benefits outweigh the costs, and there are public benefits and utility. In Minnesota, moreover, appeals of assessed benefits, damages, fees, expenses, and fulfillment of environmental and land use requirements are tried by a jury in the county district court (where appellants are subject to court fees if the appeal is rejected), while appeals of hearing orders are tried by a judge in the district court, who determines if the drainage authority's decision was arbitrary, unlawful, or not supported by the evidence. In *Ohio* – which has a public notice, hearing, and appeals process similar to that of Michigan – appeals may be made after each hearing to the court of common pleas, and none of the court's reviews are limited by the administrative record (as the proposed revision of Michigan's Drain Code would do), so the court can accept new evidence. In addition, in Ohio the court can appoint a Board of Arbitrators consisting of three disinterested individuals to review and decide appeals, though a board's decision may be appealed back to the court. Finally, jury trials are used to appeal decisions on compensation and damages. In *Wisconsin* drainage of agricultural and other lands is conducted at the county level but with significant state oversight both by the circuit court and by the Wisconsin Department of Agriculture, Trade, and Consumer Protection, which develops rules, reviews drainage projects, and hears appeals under Wisconsin's drainage statutes. Drainage districts are established in Wisconsin through a petition process in which petitions are submitted to the circuit court, which passes the petitions along to the three-member county drainage boards appointed by the court (from a list provided by the agricultural extension service). The county drainage board prepares a report for the court that comments on the sufficiency of the petition, the feasibility of the district, whether costs of construction are less than 75 percent of the benefits, and the area the district would cover. If the district would cover more than 200 acres, the board also must submit the report to the state Department of Agriculture, Trade, and Consumer Protection (DATCP), which then has 45 days to submit a statement of approval or disapproval to the court. (Each drainage district also must submit annual reports to the DATCP, and the department also must approve all proposals for maintenance and alterations.) The circuit court reviews the report and the DATCP's recommendations, and, after a public hearing, decides if the petition is sufficient, if improvements would occur, if the public health or welfare would be promoted, if the costs would be less than 75 percent of the benefits, and if no injury or impairment of natural resources would occur. If the circuit court approves a petition, the county drainage board must prepare a second report that apportions benefits and lays out the drainage district, and must submit this second report to the Department of Agriculture, Trade, and Consumer Protection for review. Property owners may appeal a county drainage board's decision to the circuit court, as well as file appeals with the DATCP, which will investigate the proceedings. The court reviews the record to determine if the decision was based on substantial evidence, whether the board was within its authority, and whether any legal errors in procedures were made that harmed the appellant. In *Florida*, where water management has largely been regionalized in five large regional water management districts to manage water resources in general, the apportionment decision can be appealed to a court of appropriate jurisdiction, and to the 30 to 40 remaining active local water control districts. These districts are governed by three-member elected boards that are required to hold annual meetings for elections (board members serve three-year staggered terms) and report actions taken by the board to the landowners.

Last Session's Drain Code Legislation: House Bill 4337. During the 1997-98 legislative session, the House Committee on Agriculture deliberated on and reported out a bill to rewrite the Drain Code. That bill, House Bill 4337 (H-6), differed in several respects from House Bill 4308, particularly including several provisions seen as desirable to those seeking citizen input and environmental protection provisions. Among other things, House Bill 4337 would have:

** allowed citizens to terminate a proposed drain project under very limited circumstances: petitioners would have been allowed to withdraw their petition and thereby terminate a proposed drain project.

** after a board of determination had issued an "order of practicability", no further action could have taken place unless either or both of the following took place: (1) the petition proposed a location and route and was

signed by at least half of the land owners in the proposed drainage district, or, if fewer than half of the landowners in the proposed drainage district had signed the petition, (2) the petitioners would have had to post security consisting of a cash deposit or bond with the drain commissioner amounting to five percent of the estimated cost of the project.

** required that new drain projects be undertaken in accordance with a "best management practices" manual -- prepared (and reviewed annually) by the Department of Agriculture with the Department of Natural Resources and the Department of Environmental Quality -- that would have had to include standards that assured that drain projects were undertaken in a way that not only (a) preserved and provided drainage but also (b) protected and conserved natural resources. The standards also would have had to address, in addition to such things as bank stability and sedimentation control, minimization of adverse impacts on plant and animal life.

** required at least two public hearings by the board of determination.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the major state fiscal impact of the bill would result from the provision that would allow a "public corporation" (including state agencies) to be assessed for all or part of the cost of a drain. The HFA notes that the Department of Transportation is currently assessed for drainage of state trunkline highways, at a cost of approximately $3 million per year. Under the bill, the Department of Transportation could incur some additional costs, and other state departments and agencies (primarily the Department of Natural Resources) would also incur costs. The HFA cites a study conducted by the Michigan Association of Drain Commissioners and the Department of Agriculture, which estimates that this could amount to $2 million annually. (11-30-99)

ARGUMENTS:

For:

Virtually everyone involved agrees that the Drain Code of 1956 has needed to be revised 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, citizens' groups, public interest environmental groups, and others, including members of the legislature, legislation has been drafted to revise the Drain Code.

Among other things, the bill would rewrite and consolidate most of the Drain Code to streamline the drain project process, expand opportunities for public input into drain project decision-making, and expand the code's public notification requirements. The bill, for the first time, would define "benefit," the term which is used in determining how much a landowner's land will be assessed for drain work. In addition, the bill would allow petitions for drain projects to include a request that measures be undertaken which were intended both to enhance or improve the natural resource values of a proposed drain and which would provide direct benefit to the designed function, longevity, or hydraulic capacity of the proposed drain. The bill further would require county drain commissioners, drainage boards, and the Department of Agriculture, as part of any drain construction or improvement project, to protect quality and the hydraulic capacity of floodplains and floodways; avoid, minimize, and mitigate impacts of new drains, improvements, and maintenance on land or interests in land (including, but not limited to, easements, owned for preservation or conservation purposes by public corporations or non-profit organizations); incorporate flow patterns into criteria for drain design and storm water management; make on-site retention and detention of storm water a priority; use applicable "management practices" adopted by the Commission on Agriculture; evaluate the impacts of drain projects on natural resources and identify appropriate measures to minimize adverse impacts; and obtain any permits required under the Natural Resources and Environmental Protection Act. The bill 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 decision-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; and it addresses the issue of land use review by requiring drain commissioners to review all requests to use existing drains as well as to review all municipal construction projects that would have a significant.

At the same time that the bill would increase opportunities for public input and allow consideration of

natural resources, it would continue to preserve and protect the crucial and exclusive authority of drain commissioners to determine the scope of drain projects that are vitally necessary to agriculture and other responsible land use. The bill also would enhance drain commissioners' ability to pay for their newly expanded decision-making responsibilities, as well as to pay for their professional education and training and that of their staffs, 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. At the same time, drain commissioners would continue to be elected officials, accountable to the voters who elected them.

Agriculture is vital to Michigan's economy, and drains are vital to Michigan agriculture. Indeed, in 1980 the Department of Agriculture estimated 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.

Response:

While much has been made of the "fact" that the bill would define "benefit" for the first time in the Drain Code, the Drain Code in fact already does contain a definition of "benefit(s)" in chapter 22, the chapter dealing with water management. Moreover, unlike the new definition proposed for chapter 1 of the Drain Code, the existing definition (and its proposed revision) does not include in the definition of "benefit" negative impacts of drain projects. Not only is it counterintuitive to include adverse impacts of a drain in the definition of "benefit" upon which a landowner is assessed, doing this means that a landowner could be determined to "benefit" from a drain project even when that "benefit" meant, among other things, a decrease in the land's natural resource values or an increase in flooding. To be required to pay for negative impacts of a drain project because the definition of "benefit" included such impacts and drain assessments are based on an apportionment of "benefits" would be to add insult to injury. The current definition of "benefit" in the Drain Code could be used instead of the new proposed definition in chapter 1. At the very least, the definition of "benefit" (a word which comes from the Latin *bene*, meaning "well") should not include negative or adverse effects of drain projects on the economic value of a landowner's land or on the environment. Moreover, it is not enough to define "benefit"; the terms that really need to be defined are "necessary" (or "necessity"), "practical", and "public health, safety, and welfare."

For:

For the first time, the bill would include in the Drain Code consideration of the impact of drain projects on natural resources, and would allow both petitioners for new drain projects and drain commissioners themselves to request or consider natural resources in the Drain Code process. For example, in the chapter on the process for petitioning for new drainage districts and new drains, petitioners would be allowed to include in their petitions a request that measures be undertaken which were intended to enhance or improve the natural resource values of the drain and which provided direct benefit to the proposed drain. Later in the process, after a drain commissioner filed the "first order of determination," he or she would arrange for an engineer to prepare an "engineering analysis" which, among other things, would have to include an evaluation of the impacts of the drain project on natural resources that identified appropriate practical measures to minimize adverse effect. In fact, this evaluation need not even be part of the engineering analysis, and could, instead, be prepared by the drain commissioner himself or herself or another qualified professional, but all costs associated with evaluating natural resource impacts and with implementing the measures to minimize those impacts would be the responsibility of the drainage district. In addition, after the drain commissioner convened the newly-required informational meeting (to provide or elicit information to assist him or her in determining the scope of the drain project once the board of determination had determined that a drain was necessary), he or she would be required to obtain any permits required under the Natural Resources and Environmental Protection Act. In addition, the drain commissioner, on his or her own initiative and at his or her discretion, would be able for the first time to include measures that were intended to enhance or improve natural resource values as part of the drainage project, even if these measures (unlike those allowed in the petition) would not benefit the drain. Though such enhancement measures would not be paid for by the drainage district, the bill would allow them to be paid by gifts, donations, grants, contracts with the federal government, special assessments other than those under the Drain Code, or any combination of these funding sources. Finally, if a proposed drain were located in a

watershed management district for which a watershed management plan had been adopted, the drain commissioner would be required to include measures to improve or enhance natural resource values, consistent with the watershed management plan. These provisions are unprecedented in the history of the Drain Code and would provide a solid foundation for ensuring that environmental concerns could be addressed in the drain process.

Response:

In the first place, it is notable that the bill would mention only "natural resources" and not "the environment." Secondly, virtually all of the mentions of consideration of "natural resource values," with the single exception of the proposed "engineering report" (which would require and evaluation of the impact of a drain project on such values and require the drainage district to pay for the evaluation), all of the other mentions of consideration of natural resources are permissive and not mandatory. A petitioner could request that measures be undertaken to enhance or improve the natural resource values of the *drain*, but only if these measures also directly benefitted the drain's "designed function, longevity, or hydraulic capacity." And the bill would not require that such requests be honored. And although the bill also would allow drain commissioners, on their own initiative, to include in drainage projects measures that were intended to enhance or improve natural resource values even if these measures didn't benefit the drain, drain commissioners are not required to do this, and even if they do, these measures wouldn't be paid for by the drainage district. While better than the existing total lack of provisions regarding environmental protection, the proposed provisions are still too weak to ensure that environmental protection (and not just natural resources) would be the integral part of the Drain Code process that it should be.

Against:

While the bill may indeed streamline the process for initiating and implementing drain projects, it also fails to address the fundamental problems with the Drain Code: its lack of effective citizen participation in decision making, its lack of substantive due process, its lack of meaningful outside oversight of drain projects, its lack of any meaningful judicial or administrative appeals process, and its lack of any mandated and meaningful environmental protection. Merely streamlining an already deeply flawed process will make the current situation worse, not better, for both individual citizens harmed by unnecessarily costly and expansive drain projects (whether by actual harm to the land they own or whether through shifting the costs of commercial and residential developers to individual local property owners) and for the environment.

A major complaint raised again and again by citizens against the current Drain Code process is that they have no effective say in the process once a project begins to move forward. In particular, once a petitioned project is deemed "necessary", not even the drain commissioner, much less ordinary citizens, can stop a project. But further, because the scope of drain projects is entirely at the drain commissioner's discretion, citizens initiating a petition have no say in how the final project will wind up once a petition leaves their hands, regardless of what they might have requested originally. This means that a drain commissioner may expand any project, no matter how small and limited in a petition, as he or she sees fit. In some cases, relatively small petitioned projects have ballooned into multi-million dollar projects, with landowners having to pay for the greatly expanded projects and, in some cases, with some landowners suffering losses in the value of their land even while having to pay for the sometimes dubious "benefits" of the drain to them. This situation, in which people have come feel that initiating a drain project is similar to buying a pig in a poke, has actually resulted in a general reluctance to request even necessary drain work, for fear of the costs of "runaway" projects over which the people paying have no control.

Proponents of the bill point to the expanded notification requirements and the possibility of increased citizen "input" into the drain process through the bill's increased number of public hearings. But although the bill would allow for more public hearings, the bill still actually would require only a single public hearing by the board of determination before it decided to authorize the drain commissioner to move forward with a drain project. In addition, the drain commissioner would be required to hold a single "informational" hearing after he or she received the "engineering report." But while the board of determination would be required to "consider" information gathered by the drain commissioner, it would only have to "receive" testimony and evidence (presumably from the public) at its hearings. That is, at no point would the bill require the board of determination or the drain commissioner to act on public input.

Sometimes people state their frustration with their inability to meaningfully participate in drainage projects decision making -- whether in terms of being able to stop or alter ill-conceived projects -- in terms of a lack of due process. (Some people also talk about drain assessments as "taxation without representation,"

as the drain commissioner, an executive and not legislative office, can impose taxes or something very nearly like taxes without a vote of the people.) There is a vast body of legal literature on due process, but in general the concept of "due process" has to do with the protection of personal liberty, personal security, and real and personal property against burdensome or arbitrary exercise of governmental power. Generally speaking, "due process" is divided into either "procedural" or "substantive" due process. "Procedural" due process has to do with whether or not established judicial or legislative procedures have been followed, regardless of the outcome of those procedures. Thus, for example, so long as the legislature lays out procedures in the Drain Code for drain commissioners to acquire land and rights of way and to apportion and levy special assessments for drainage projects – and so long as drain commissioners follow these procedures – then "procedural" due process requirements generally are assumed to have been met. So by expanding the notification and public meeting requirements, the bill would actually expand "procedural" due process in the Drain Code. However, neither the existing Drain Code nor the proposed revision address the issue of "substantive" due process, which refers to restricting the exercise of governmental authority to deprive people of their fundamental rights, including the governmental taking of people's private personal and real property. When people object to the fact that the Drain Code process, once initiated, is one in which they have no say over how much of their land or their money (in the form of "special assessments") eventually will be taken from them by the drain commissioner – who has and would keep sole authority over the "scope" of any proposed drainage project – at least part of their objection has to do with what could be called a lack of substantive due process. Once a drain project begins, people have no say (other than public testimony that the drain commissioner can disregard at will) over how much of their land will be taken or how much they will have to pay in special assessments (formerly called "drain taxes") for drain projects they may strenuously object to. (Some people, pointing to the "rain tax" court case recently lost by the city of Lansing, argue further that simply changing Drain Code references from "drain taxes" to "special assessments" does not mean that "special assessments" for drainage projects are not, in fact, still drain taxes – and the only taxes levied by an elected executive official, not a legislative body.)

Put another way, many people believe that drain commissioners have no real accountability or oversight, and that this lack of accountability and oversight has led to egregious abuses of the process, even when the entire process was procedurally in accord with statutory requirements as set forth under the Drain Code. Thus, even though the current Drain Code and the bill would allow for procedural appeals, adhering to proper procedure alone will not necessarily protect people's fundamental property rights. If the Drain Code is to be meaningfully revised – which is to say, if the legitimate complaints of citizens whose property rights have been violated through "procedurally correct" drainage processes – then drain commissioners' current unrestricted powers and authority over the scope and impact of drain projects need to be reasonably restricted instead of consolidated and preserved. At the very least, independent, meaningful oversight of drain projects ought to be put in place, as well as effective, meaningful administrative and judicial appeals throughout the drainage project process.

Response:

Some people have pointed out that drain commissioners, as county-wide elected officials, are in fact accountable – to the voters. If a drain commissioner does something that harms people or their property, then, as elected officials, they can be recalled or simply not reelected at the next election. So in fact there is accountability and oversight of drain commissioners in the form of the electoral process.

Against:

It is time to completely rethink the way watersheds are managed in the state. Instead of tweaking the outdated and increasingly unworkable system of elected county drain commissioners (who, because they are elected officials, cannot even be required to have any knowledge of or expertise in drainage), the office itself should be abolished and replaced with a more rationalized system requiring a certain level and kind of technical expertise. The office of county-wide elected drain commissioner is an artifact of the 18th and 19th centuries when wetlands were considered unequivocally "bad" and an impediment to settlement by European and European-American dryland farmers. Michigan's agricultural drains were already in place by the middle of this century, as the 1980 Department of Agriculture special report indicates; the pressing land use issues at the end of this century include controlling suburban sprawl, preserving medium and small family farms, and protecting the environment for future generations. Other states offer good examples of how this could be done. (See BACKGROUND INFORMATION.)

As the September 20, 1999, Legislative Service Bureau memorandum on drainage laws in other states points out, Michigan is unique in having an elected drain commissioner among Midwestern states (and also is

unique in not explicitly requiring that the benefits of a drainage project outweigh the costs in order for the project to be approved), as well as having little project plan oversight by outside agencies compared to other states. For example, rather than having a single, county-wide elected drain commissioner, Ohio and Minnesota administer their drainage laws through county boards of commissioners, while Wisconsin's drainage boards are appointed by the circuit court. And in Florida, where regional water management law has superseded most of that state's local drainage statutes, regional water management district boards are appointed by the governor, with the approval of the Senate, while the 30 to 40 remaining local water control districts (encompassing areas of 20 to 200 square miles) are governed by three-member boards elected by landowners in the district.

At the very least, if the office of county-wide elected drain commissioner is not abolished, then the drain commissioner's sole authority over the scope of drain projects ought to be significantly altered through the inclusion of meaningful outside oversight of the office and its activities and an effective and meaningful appeals process. Again, other states' laws could provide models for this process. In fact, instead of increasing public oversight, the bill actually would decrease public access to drain district documents that, theoretically (if not always in practice), could provide citizens with valuable information on drains and drainage districts. For although Michigan's Drain Code currently requires drain commissioners to make annual reports to county boards of commissioners, including "a full financial report," the bill would eliminate the required reporting in favor of reporting upon the request of "the legislative body of a municipality." Thus, individual citizens no longer would have access to even the current modicum of information made possible by mandatory annual reports, and would have to depend on their municipalities to request such reports in order to gain access to this information in an accessible form. If the municipality chose not to request a report from a drain commissioner, ordinary citizens affected by drain projects (which in Michigan encompasses the majority of the citizenry) would be left without this important avenue of information on, and insight into, their drain commissioners' activities.

Response:

The bill would address the fact that, as elected officials, drain commissioners cannot be required to have any special expertise in drainage or watershed management or other related matters by allowing drain commissioners, with the approval of their county board of commissioners, to assess land in their drainage districts a one percent assessment for their education and training and that of their staffs. The bill would specify, moreover, that the funds collected under this provision would have to be consolidated (because a county can have literally hundreds of drainage districts) and kept in a separate account for one or more of a list of purposes (including best management practices, environmental protection and enhancement, watershed management and planning, assessing and financing for drain projects, drain construction methods and techniques, and "any other matter related to the operation of the office of drain commissioner or the construction, operation, maintenance, or improvement of drains"). The bill also would specify that this provision was intended to supplement, not replace, county general fund appropriations for these purposes.

Reply:

Why should property owners be required to fund the professional development of any elected official? If someone who was not technically qualified to oversee drainage and other watershed matters were elected to office, why shouldn't he or she have to fund her own professional development instead of the property owners in his or her drainage districts? (Moreover, allowing "any other matter related to the operation of the office of drain commissioner" to be funded by this additional assessment could presumably include all kinds of office training, such as office management, word processing, and so forth, which hardly seems like the other technically specialized areas mentioned in the bill.) Presumably many elected officials could benefit from various kinds of professional development, but does this mean that the taxpayers who elected them should foot the bill?

***Against*:**

It's already too easy to get drain projects started -- and impossible to stop them once they've started. Moreover, even though much discussion focuses over the process for constructing new drains, the fact is that Michigan already has so many drains and drainage districts that most drainage work -- including some of the most environmentally damaging drainage work -- is done under "maintenance" or "improvement" of existing drains (even if these drain "exist" only on a piece of paper, or some other even less visible record).

The bill would make it even easier to start new drain projects by halving the number of people required to sign a petition for drain work, by collapsing the current two-step petition process (one for a drainage district, another for the actual project) into a single petition process, and by reducing the amount of tax delinquent land in a proposed drainage district that would disqualify the project. Many people, while not opposed

in principle to the need for drains and drain projects, have wound up being saddled with costly, environmentally damaging drain projects that went far beyond what was needed, and rightly fear initiating any drain projects for fear of setting this process in motion. The bill would explicitly say that the "scope" of a drain project was within the sole authority of the drain commissioner ("in consultation with his or her engineers or other qualified professionals"), so that not only would boards of determination (appointed by the drain commissioner) not be able to limit the scope of a proposed drain project, neither would any other outside agency or body -- including citizens' groups, public interest environmental protection groups, conservation groups, or even the courts. By statutorily leaving the scope of all drain projects solely with county drain commissioners, the bill would continue to perpetuate fundamental problems that exist with the current Drain Code, including lack of effective and meaningful participation by citizens in the decision making process and lack of substantive review by the courts of drain projects obviously gone badly awry. The only way to restore people's trust in the Drain Code process is to give the citizenry an effective and meaningful (not merely advisory) say in the process and effective, meaningful appeal regarding drain commissioner or drainage board expansion of drain projects and any damaging effects such projects have on private property values and the environment.

In addition to all of the issues around the process of establishing new drains, there are additional (though often also similar) problems with work on existing drains. For example, once a drain is "established" it continues in "existence" virtually in perpetuity. This means that whether or not records of its existence are available (readily, if at all), and even if no actual work ever was done on it, it can at any time be "improved" or "maintained" with potentially disastrous results to individual property owners and to the environment in general. Thus it is possible for someone to buy a piece of land, and, even though no readily available record (and in some cases, even no record at all) exists indicating that a drain and drain rights-of-way have been "established" on the owner's property, that owner can wind up having his or her property and its value damaged should a determination be made to "improve" or "maintain" the heretofore invisible drain. In order to protect both individual property owners' rights, some reasonable and meaningful limitations must be put on how much and what kind of drain work can be done on an existing "drain."

Response:

Even though the bill would not allow citizens to stop a drain project, it would add to drain commissioners' authority the ability to stop drain projects that, in the drain commissioner's opinion, were not feasible. Currently, drain commissioners can decide that an application for a drainage district is impractical, and take no further action. And if, after a board of determination determines that a new drain is necessary, if too much of the land in the proposed drainage district is tax delinquent, the process ends. (A county board of commissioners also can order a drain commissioner to refuse an application to lay out a drainage district unless the application is accompanied by a cash deposit sufficient to cover the preliminary costs of the process, but the drain commissioner cannot do this without such an order.) The bill, for the first time, would allow a drain commissioner to reject a petition for a new drain even after a board of determination determined that the drain project was necessary, if in the drain commissioner's opinion the project was not feasible.

POSITIONS:

A representative of the Department of Agriculture testified in support of the bill. (11-17-99)

A representative of the Michigan Association of Drain Commissioners testified in support of the bill. (11-17-99)

A representative of the Michigan Farm Bureau testified in support of the bill. (11-17-99)

The Detroit Audubon Society opposes the bill. (11-18-99)

The Great Lakes Federation opposes the bill. (11-24-99)

The Mackinac Chapter of the Sierra Club opposes the bill. (11-24-99)

The Dwight Lydell Izaak Walton League opposes the bill. (11-24-99)

The Michigan Drain Code Coalition opposes the bill. (11-24-99)

The Public Interest Group in Michigan (PIRGIM) opposes the bill. (12-1-99)

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.