House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

REVISE DRAIN CODE

House Bill 4803 as passed by the House
Second Analysis (1-26-00)

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 substantive changes to the current process for initiating, maintaining, and paying for drains, as well as making numerous other significant and 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" or "drain special assessments."

** Language currently referring to the "necessity" of drains in terms of "public health, convenience, and welfare" would be replaced with language that would base determinations of "necessity" on whether the drain was necessary for "public health, safety, or welfare or for agriculture."

** In addition to the current definition of "benefit" in Chapter 22 of the Drain Code, the bill would add a second definition of "benefit" (a term used in determining and apportioning assessments for drain work) in Chapter 1 that would include both "the positive or negative consequences" of a drain project for individual parcels of land. Thus, under the bill, "benefit" would include decreases in the value or use of lands and property resulting from a drain project (including decreases in natural resource values and increases in flooding), as well as increases in the value or use of lands and property (including increases in natural resource values and decreases in flooding).

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.

** Protections to drain commissioners' fringe benefits would be added.

** Drain commissioners would be given, statutorily, sole authority over the scope of drain projects.

** Drain commissioners would be given the authority to decide that a drain project was not "feasible" (which is not defined in the bill) and reject a petition.

Petition process

** The number of petitioners for a drain project would be changed from "10 freeholders" to "10 landowners" or landowners representing 25 percent of the lands potentially liable for assessment (the bill would define "landowner" to mean "a person holding the most recent fee title or a land contract vendee's interest in land as shown by the records of the county register of deeds." If there were more than one person with a fee interest or land contract vendee's interest in land, each such person would be a "landowner," but only one such person would sign a petition under the bill.)

** 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.

** Notice of hearings of necessity would have to say (1) what relief was being requested by the petition, (2) the reasons for relief as presented in the petition, and (3) that a copy of the "preliminary analysis" (see Glossary below) was available for inspection in the drain commissioner's office.

** The proceedings of all boards of determination hearings would be recorded verbatim for the record.

** 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 were dismissed or rejected.

** The decision-making process on requested drain projects would have to include both a "preliminary analysis" (instead of the current "survey") and an "engineering analysis" (see Glossary below).

** Parties aggrieved by an "order of necessity" or an "order of no necessity" (see Glossary below) could request a review in the circuit court of whether the order were authorized by law and supported by substantial, material, and competent evidence. The review would be based only on evidence in the official transcripts of board of determination hearings. If a public corporation would be assessed under an "order of necessity," the public corporation also could appeal in the circuit court.

** 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 to establish a drainage district and a drain based on whether or not the proposed drain was necessary to the "public health, safety or welfare or for agriculture" instead of, as currently, on "public health, convenience and welfare."

** The bill would put into law that county drain commissioners and intercounty drainage boards would have sole authority in determining the scope of a proposed drain project.

Other provisions

** For the first time, "public corporations," would be assessed for drain projects. Currently, the only public bodies that pay assessments for drains are the Department of Transportation (for roads) and local governments (when public health is at issue). The bill would allow drain assessments of any state department (including the Department of Natural Resources), agency, or authority, college or university, junior or community college, school district, or local government (a county, township, city, or village).

** As part of any drain construction or improvement project, county drain commissioners, intercounty drainage boards, and the director of the Department of Agriculture would be required to (1) incorporate flow patterns into criteria for drain design and storm water management; (3) make on-site retention and detention of storm water a priority, and (3) obtain any permits required under the Natural Resources and Environmental Protection Act. In addition, in the case of new drains, improvements and maintenance projects, drain commissioners, drainage boards and the director of the department would be required to (1) protect water quality, headwaters, main branches, and tributaries, as well as the hydraulic capacity of floodplains and floodways; (2) avoid, minimize, and mitigate impacts on land or interests in land (including, but not limited to, easements owned for preservation or conservation purposes by a public corporation or private non-profit organization); and (3) use "applicable management practices" adopted by the commission of agriculture. [Section 3(2)]

** References to nonbinding consideration of impacts of drain project on "natural resources" would be added to the Drain Code for the first time.

Glossary. The bill has a number of different kinds of orders or analyses that county drain commissioners or intercounty drainage boards would or could enter or execute or have prepared. The following list is taken from the bill as an aid to understanding aspects of the proposed process.

Once a petition under the proposed drain process had been accepted, a drain commissioner or a drainage board would arrange for a *preliminary analysis* (sections 52 and 102) to be prepared by a qualified engineer. A preliminary analysis would have to include all of the following:

(1) A description of the [proposed] drainage district (this part of the analysis could be provided by a qualified surveyor instead of by the engineer);

(2) A proposed route and course for the proposed drain;

(3) An estimate of the cost of the proposed drain;

(4) A description of the impacts to the natural resources of the proposed drain.[in Section 52 only]

Later on in the drain petition process, if a drain commissioner or drainage board filed a "first order of determination" (see below), the drain commissioner or drainage board would arrange for an engineer to prepare a more extensive *engineering analysis* (Sections 60 and 110). This more extensive engineering analysis would have to include all of the following:

(1) A hydrologic and hydraulic report that included, but was not limited to, a discussion of the present drainage characteristics and the impacts of the proposed project on flooding characteristics downstream of the drainage district;

(2) A recommended route and course;

(3) An existing and proposed profile of the recommended route and course;

(4) A description of the recommended work, including crossings, structures, and facilities;

(5) A description of the drainage district (which could be done by a surveyor rather then an engineer);

(6) An estimate of the cost of construction of the engineer's recommendation;

(7) A description of alternatives considered;

(8) An analysis of the effectiveness of the proposed project to address the conditions that it was intended to

remedy, create, or enhance;

(9) A maintenance plan for the proposed drain;

(10) An evaluation of the impacts of the proposed project on natural resources that identified "appropriate practical measures" to minimize adverse effects; and

(11) Any other information required by the drain commissioner or the drainage board.

After a county board of determination or an intercounty drainage board had determined that a proposed drain would be "practical" but that the board needed additional information (a) to determine the boundaries of the proposed drainage district or (b) to determine whether a proposed drain were necessary, the board would determine the boundaries of a "tentative"drainage district, recess to allow the additional information to be gathered, and issue an *order of practicality*. (Sections 52 and 103a). This order of practicality would specify both:

(1) the information ("from within" sections 60 and110, which provide for engineering analyses) "which is needed," and

(2) the boundaries of the "tentative" drainage district.

Once a board of determination or an intercounty drainage board determined that a proposed drain was necessary, it would enter an *order of necessity*. (Sections 55 and 105) An order of necessity would have to specify:

(1) the finding of necessity,

(2) the boundaries of the proposed drainage district, and

(3) the public corporations liable for assessment "at-large" for a portion of the costs of the drain for public health, safety, or welfare.

A board of determination or a drainage board also could find that a proposed drain was not necessary, and would have to enter an *order of no necessity* rejecting the petition for the proposed drain (Sections 57 and 107).

After filing an order of necessity, a board of determination or an intercounty drainage board would execute and file a *first order of determination*. (Sections 59 and 109) A first order of determination would:

(1) establish a drainage district and give it a name or number,

(2) describe the drainage district, and

(3) describe the beginning, route, terminus, type and the estimated cost of the proposed construction; and,

(4) for intercounty proposed drain projects only, review and establish the percentages of the whole cost of construction to be borne by each county, and determine the number of installments in which drain special assessments would be collected (Section 109).

Before an engineering report were completed, a county drain commissioner (or an intercounty drainage board) could determine that a petitioned drain project was "not feasible" and, after a public hearing, determine to reject the petition. At this point, the drain commissioner would enter an *order of rejection* (Sections 61 and 111). (A county board of commissioners, at the beginning of the drain process, also could order a drain commissioner to *refuse* any petition that wasn't accompanied by cash deposits. Section 51)

After an engineering analysis had been completed and a public informational hearing held, a drain commissioner would decide the route and course, type of construction, and other features of a proposed drain. If the drain commissioner didn't decide to reject the petition, he or she would proceed to acquire property for the proposed drain, after which he or she would prepare and file in his or her office a *final order of determination* that would "establish" the drain (Sections 63 and 113).

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 add a second, different definition of "benefit(s)" to the first chapter of the code. The bill 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 [Section 12(b)] 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: (1) increase *or decrease* in natural resource values. (2) *increase* or decrease in flooding. (3) 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).

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." (Note that this section does not require drains to be "necessary," but merely "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.

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. 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 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.

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: [Section 3(1)]

(1) Protect water quality, headwaters, main branches, and tributaries and the hydraulic capacity of floodplains and floodways in new drains, improvements, and maintenance projects.

(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” (not defined in the bill), adopted by the Commission of Agriculture, in new drains, improvements, and maintenance projects. 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), Department of

Environmental Quality (DEQ), public corporations, 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.

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.

Statutory authority to acquire land for drains. 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.

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.

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;

** to the extent authorized by the drain commissioner, allow deputy drain commissioners to execute the powers and duties of a drain commissioner;

** 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;

** 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;

** 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);

** allow the office of the drain commissioner to be kept at "an official county facility" instead of, as currently, at the county seat;

** 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;

** 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;

** 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";

** require the drain commissioner to meet with a person who was considering filing a petition under the Drain Code and who requested a meeting to discuss a potential project or the Drain Code's requirements. The drain commissioner would have to meet within 14 days after a request were made, unless the person requesting agreed to meet at a later date.

** 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";

** 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;

** 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;

** 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;

** 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;

The proposed process for initiating new drainage districts and new drains is outlined in more detail below.

Process for new drains. The bill would create a new, single-step petition process, in place of the current two-step application (for establishing a drainage district) and petition (to locate, establish, and construct a drain) process, that would simultaneously establish new drainage districts and new drains. (For the current Drain Code process for initiating new drains, see BACKGROUND INFORMATION.) The process would generally be similar both for county drains and drain commissioners (Chapter 3, which would replace the current Chapters 3 and 4) and for intercounty drains and drainage boards (Chapter 5, which would replace the current Chapters 5 and 6). Under the bill, a single petition would be required both to establish a drainage district and to establish and construct a drain.

Petitions. A petition could be signed either by landowners (instead of "freeholders") or by public corporations (instead of county public health departments or cities, villages, or townships). A "public corporation" would include state departments or agencies (including colleges and universities), authorities created by or under state law, junior or community colleges, school districts, or municipalities (counties, cities, villages, and townships). Currently, a county public health department or a local government can sign a petition to establish a county drainage district, while local governments can sign a petition to locate, establish, and construct a drain, if the proposed drainage district and drain is necessary for the public health. Under the bill, a public corporation could initiate a petition if the proposed drain were necessary "for public health, safety, or welfare or for agriculture" [(Sections 51 and 101] (instead of, as currently, for public health only) and if the public corporation would be liable for an assessment at large for a percentage of the cost of the proposed drain (as currently is the case).

Petition contents, accompanying documents. Under the bill, a petition to initiate the establishment of a drainage district and construction of a county drain would have to (a) request the establishment of a drainage district and the establishment and construction of a drain and (b) set forth the reasons for the request. The bill also would allow a petition both (1) to propose a location and route for the proposed drain (which currently is required in an application for the establishment of a drainage district) and (2) to request that measures be undertaken that were intended both to enhance or improve the natural resource values of the proposed drain and that 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. [Sections 51 and 101]

As is now the case, a petition under the bill would have to be accompanied by (a) a description -- the bill would add, "or tax parcel number" -- of the land in the proposed drainage district owned by each petition signer and (b) by a county treasurer's certificate as to payment of taxes and special assessments against the lands. The certificate, as currently, would have to be substantially in a form that said "*I hereby certify that there are no taxes or special assessments unpaid against any of the lands described in the annexed list according to the records of the county treasurer's office for the preceding 3 years, except as follows:* (namely, a list giving a description of the land, the year and amount of the (unpaid tax) or assessment)." [Sections 51 and 101]

Eligibility of signers, tax delinquent lands. Currently, the eligibility of the signers of a Chapter 3 application to establish a drainage district is determined by the drain commissioner based on the application signer's "interest of record in the office of the register of deeds, in the probate court or in the circuit court of the county in which [the] lands are situated" at the time the application is filed. Under the bill, the drain commissioner would continue to determine the eligibility of petition signers and whether a signature would be counted towards the number needed for a valid petition based on the tax delinquent status of the signer's lands. [Section 51] (For proposed intercounty drain projects, the drain commissioner of the county in which a petition were filed would determine the eligibility of petition signers and whether a signature would count. [Section 101]. The drainage board would determine the sufficiency of a petition at the meeting called by the director of the Department of Agriculture. [Section 102]) As currently is the case, if one-third or more of the lands in a proposed drainage district were tax delinquent for the preceding three years, the bill would prohibit the drain commissioner from taking any further action.[Sections 51 and 101]

For a petition signed by a public corporation, the entry of an "order of necessity"would be considered a determination of the sufficiency of the petition. (Currently, the entry of an order designating a drainage district is considered a determination of the sufficiency of a Chapter 3 application by a county board of health, city, village, or township for the establishment of a drainage district.) [Section 51]

Payment for costs of an aborted petition process. Currently, a county board of commissioners can, by resolution, instruct a drain commissioner to refuse any Chapter 3 application to establish a drainage district unless a cash deposit ("sufficient to cover the preliminary costs") accompanies the application, and if the drain is completed, the cost advanced must be returned to the depositor (or his or her personal representative) out of "the first tax collections on the drain." If the drain is "uncompleted," any excess above costs must be returned to the depositor. The bill would continue to allow county boards of commissioners to instruct their drain commissioners to reject all petitions (to establish a county drainage district and establish and construct a county drain) unless the petitions were accompanied by cash deposits (equal to "the drain commissioner's reasonable estimate of the costs to be incurred by the office of drain commissioner in proceedings under this chapter [of the Drain Code] until the entry of an order of no necessity or an order of necessity"). [Section 51])

Under Section 51 of the bill (that is, for county drains), different parties would be responsible for paying the costs of an aborted drain project process, depending on if, or when, the board of determination entered an "order of necessity," an "order of practicality," or an "order of no necessity." More specifically, costs incurred by the office of drain commissioner in county drain proceedings under the proposed Chapter 3 petition process, including any attorney fees, would have to be paid as follows:

(1) By the [proposed] drainage district, if the board of determination entered an "order of necessity." Any required deposit would be returned to the depositor out of the [proposed] drainage district's first special assessment collections or out of borrowed funds secured by special assessment collection on the [proposed] drain, whichever came first. (Note: Under

the bill, a drainage district would not be established until the "first order of determination" had been executed and filed. See below.)

(2) By the petitioners, if the board of determination entered an "order of no necessity" and the county board of commissioners had required a deposit.

(3) By "the drainage district," if the board of determination entered an "order of practicality" and then an "order of no necessity." The bill would specify that costs incurred after the "order of practicality" and down through the entry of the "order of no necessity" would not be paid by the petitioners but would be apportioned under Chapter 7 (which provides for the apportionment of drain assessments based on "benefits" received) and assessed against the [proposed] drainage district as described in the order of practicality. (Note: A drainage district would not be legally established under the bill until a "first order of determination," which would not be executed in these circumstances.)

(4) From the county general fund, if the board of determination entered an order of necessity and the board of commissioners had not required a deposit.[Section 51]

For intercounty drain petitions, if a drainage board found that a [proposed] drain were not necessary, the costs of the process up to that point would be apportioned to "the tentative drainage district" as if the drain had been constructed. [Section 103a] Similarly, if a drainage board found that a [proposed] drain were "practical," but subsequently determined the [proposed] drain not to be "necessary," the lands in the "tentative drainage district" would be subject to assessment to pay for costs incurred by the drainage board up to that point in the process. [Section 103]

A county board of commissioners, as currently, could instruct a drain commissioner to refuse a petition not accompanied by a cash deposit.

Preliminary analysis. Once a county drain commissioner or an intercounty drainage board determined that a petition was sufficient, they would have to ("promptly") arrange for a qualified engineer to prepare a "preliminary analysis" (instead of a "survey"). [Sections 52 and 101] A preliminary analysis would have to include the following specified information:

(1) A description of the [proposed] drainage district (this could be provided by a qualified surveyor instead of an engineer);

(2) A proposed route and course for the [proposed] drain;

(3) An estimate of the cost of the proposed drain;

(4) A description of the impacts to the natural resources of the proposed drain. [This applies only to county drains under Section 52.]

Board of determination: appointment, hearing(s). "As soon as practicable" after a preliminary analysis was filed, a drain commissioner would, as currently is the case, be able to appoint a three-member board of determination (plus "an alternate individual"). [Section 52]

If a drain commissioner chose not to appoint a board of determination (or were disqualified from appointing one), the chair of the county board of commissioners, as currently, would have to appoint the board of determination [Section 52]

All board of determination hearings would have to have verbatim records of the proceedings. [Sections 52]

Intercounty drainage board hearing. The director of the Department of Agriculture, who is (and would continue to be) the chair of intercounty drainage boards, would have to call a meeting of an intercounty drainage board (which would, as currently, consist of the director of the MDA and the drain commissioners of each of the counties involved) "as soon as practical but not later than 63 days after the filing of a petition." [Section 101] Again, "as soon as practical, but not later than 60 days after the filing of the preliminary analysis, the director of agriculture would have to] call a hearing of the drainage board." [Section 102]

First required public hearing: the necessity of a proposed drain project. When a board of determination (or a drainage board) held its hearing to consider whether or not a proposed drain project were necessary, it would have to (a) "receive testimony and evidence on whether the [proposed] drain [was] necessary and conducive to the public health, safety, or welfare or for agriculture," (b) consider the preliminary analysis, and (c) determine one of three things: namely, (1) that the [proposed] drain was "necessary," (2) that the [proposed] drain was "not necessary," or (3) that the [proposed] drain was "practical" but that additional information was needed either to determine whether or not the [proposed] drain was necessary or to determine the boundaries of the [proposed] drainage district. [Sections 53 and 103]

(1) Determination of necessity, order of necessity. If a board of determination (or a drainage board) determined that a [proposed] drain were necessary, it then would have to enter, and file with the drain commissioner (or "the director of agriculture" in the case of proposed intercounty drain projects), an "order of necessity." An order of necessity would have to specify (1) the finding of necessity, (2) the boundaries of the [proposed] drainage district, and (3) the public corporations liable for assessment "at-large" for a portion of the costs of the [proposed] drain for public health, safety, or welfare. [Sections 55 and 105]

(2) Determination of "no necessity," "order of no necessity"; limit on new petitions. If a board of determination (or drainage board) determined that a [proposed] drain was "not necessary," it then would have to enter an "order to that effect" [Sections 53 and 103a]. That is, the board of determination (or drainage board) would have to enter an "order of no necessity," and apportion the costs to be paid as required under the bill. No new petition for the rejected proposed drain could be filed for a year after the filing of the order of no necessity. [Sections 57 and 107]

(3) Determination of "practicality," "order of practicality,: establishment of a "tentative drainage district." If a board of determination (or a drainage board) determined that a [proposed] drain were "practical" but that it needed additional information to determine either the necessity of the [proposed] drain or the boundaries of the [proposed] drainage district, it would have to (a) determine the boundaries of the "tentative drainage district" [Sections 53 and 103); recess to allow the drain commissioner gather (or, in the case of a drainage board, to allow for the gathering of) the additional information [Sections 53a and 103a]; and enter an "order of practicality" specifying the information needed and the boundaries of the "tentative drainage district". [Sections 53a and 103a]

A drain commissioner could determine, during the gathering of the additional information, that the [proposed] drain was not "practical," and would have to reconvene the board of determination. [Section 53a]

At the reconvened hearing, the board of determination would have to receive the drain commissioner's determination [of the proposed drain's being "not practical"], receive testimony and evidence as to the drain commissioner's determination, and either direct the drain commissioner to finish gathering the additional information or find that the [proposed] drain was not necessary. [Section 53a]

If a board of determination directed a drain commissioner to finish gathering the additional information, the drain commissioner would have to do so and, after gathering the additional information, would have to reconvene the board of determination. At the reconvened meeting, the board of determination would have to (a) receive and consider the additional information and testimony on whether the [proposed] drain was necessary, and then (b) determine whether or not the [proposed] drain was necessary. [Section 53a]

Authority over the scope of drain projects. The bill would explicitly specify that a board of determination could not determine the scope of a project and that the scope of a project would be "within the sole authority of the drain commissioner in consultation with his or her engineers or other qualified professionals." [Section 55] In the case of intercounty drains, the bill would specify that a drainage board could not determine the scope of a project in an "order of necessity or at the [public] hearings," but that "the scope of the project [would be] within the sole authority of the drainage board in consultation with its engineers or other qualified professionals." [Section 105]

Required public hearing on an order of necessity. If a board of determination entered an order of necessity, the drain commissioner would have to convene a second public information meeting "to provide or elicit information and testimony with regard to the route and type of construction and estimate of cost of the [proposed] drain to assist the drain commissioner in determining the scope of the drain project." The bill would explicitly specify that the meeting was "for informational purposes only." [Section 61]

A drainage board apparently would not have to convene a second public information meeting after entering an order of necessity, though it would have to notify each public corporation identified in the order of necessity as being liable "for a percent of the cost of the construction of the [proposed] drain for benefits for public health, safety, or welfare."[Section 106]

"First order of determination"; establishment of a drainage district. After an order of necessity were filed, a drain commissioner (or a drainage board) would have to "execute" and file a "first order of determination" that would (1) establish the drainage district and give it a name or number, (2) describe the drainage district, and (3) describe the beginning, route, terminus, type and the estimated cost of the proposed construction. [Sections 59 and 109] A first order of determination executed and filed by a drainage board also would have

to review and establish the percentages of the whole cost of construction each county would have to bear, as preliminarily determined under Section 103, and determine the number of installments in which the "drain special assessments" would be collected. [Section 109]

Engineering analysis. After a drain commissioner (or a drainage board) filed a first order of determination, they would have to have a qualified engineer prepare an "engineering analysis" that described the [proposed] drain and drainage district "to address the reasons for the [proposed] drain and drainage district set forth in the petition and in the evidence and testimony received at the board of determination hearing." [Sections 60 and 110] An engineering analysis would have to include all of the following:

(1) A hydrologic and hydraulic report that included, but was not limited to, a discussion of the present drainage characteristics and the impacts of the proposed project on flooding characteristics downstream of the drainage district;

(2) A recommended route and course;

(3) An existing and proposed profile of the recommended route and course;

(4) A description of the recommended work, including crossings, structures, and facilities;

(5) A description of the drainage district (which could be done by a surveyor rather then an engineer);

(6) An estimate of the cost of construction of the engineer's recommendation;

(7) A description of alternatives considered;

(8) An analysis of the effectiveness of the proposed project to address the conditions that it was intended to remedy, create, or enhance;

(9) A maintenance plan for the [proposed] drain;

(10) An evaluation of the impacts of the [proposed] project on natural resources that identified "appropriate practical measures" to minimize adverse effects; and

(11) Any other information required by the drain commissioner or the drainage board. [Sections 60 and 110]

Engineer's final plans, specification, and cost estimate. The bill would require the engineer to prepare "final plans, specifications, and an estimate of the proposed drain's costs," and the drain commissioner would have to get (from the engineer or a surveyor) a description of the lands or rights-of-way needed for the proposed drain. [Sections 63 and 111]

NREPA permits. The drain commissioner (or drainage board) would have to obtain any required Natural Resources and Environmental Protection Act (NREPA) permits.[Sections 61 and 111]

Determination that a proposed project was "not feasible": Public hearing, determination of rejection, order of rejection. After receiving the engineer's final plans, specifications, estimate of cost, and description of the lands and rights-of-way needed for a proposed drain, a drain commissioner (or a drainage board) could determine that a project was "not feasible" (which is not defined in the bill). If a drain commissioner (or drainage board) made this determination, they would have to notify the landowners and public corporations in the drainage district by first-class mail of "the intent to reject the petition," and hold a public hearing "to hear objections to the rejection of the petition" At the public hearing, the drain commissioner (or drainage board) would have to "elicit testimony and evidence with regards to the proposed rejection," and then determine whether or not the petition should be rejected. If the drain commissioner (or drainage board) determined to reject the petition, they would enter an "order of rejection" and apportion all costs incurred to the district as though the project had been built. The costs would then be assessed and paid as though the project had been built. Unlike a determination that a proposed drain was not necessary, an order of rejection would not limit the right to file a subsequent petition. [Sections 61 and 111]

Required public hearing on an engineering analysis. When an engineering analysis had been completed and filed in a drain commissioner's office, the drain commissioner (or drainage board) would have to convene the third (or, for proposed intercounty projects, second) required public hearing in the petition process "to present and receive testimony and other evidence on the engineering analysis and the project proposed to be undertaken." [Sections 62 and 111] The drain commissioner (or drainage board) would have to consider the testimony and other evidence offered at this public hearing on the engineering analysis "and decide the route and course, type of construction, and features of the [proposed] drain." [Sections 62 and 111]

Acquisition of property for a proposed drain. Unless a drain commissioner (or drainage board) had decided to reject a petition, they would proceed at this point to acquire property for the [proposed] drain as specified in the proposed new Chapter One (Section 7) of the bill. [Sections 63 and113]

Final order of determination. After acquiring the property necessary for a [proposed] drain, a drain commissioner (or drainage board) would prepare and ("promptly") file a "final order of determination" establishing the drain, and proceed to the apportioning and reviewing of assessments (based on the apportionment and review of "benefits") under Chapter 7, the letting of contracts under Chapter 9, and the levying and collecting "drain special assessments" under Chapter 11. [Sections 63 and 113) Section 151 of Chapter 7 states this in a slightly different form, saying that after a drain commissioner or drainage board had acquired "rights-of-way or easements" (that is, instead of "property"), they would "make the final order of determination establishing the drain" and file it with the county drain commissioner not later than seven (instead of the current five) days after the order was made. [Section 151]

The boundaries of an established drainage district could be changed by petition amending a final order of determination, "if, in the drain commissioner's or drainage board's opinion it [was] to the best interest of all concerned that the . . . . lands be changed." If the drain commissioner or drainage board made an order amending a drainage district's boundaries, they would have to provide notification as required under the bill and convene a day of review of apportionment. (That is, new lands could be added to a drainage district without the process outlined above.) [Section 151]

Public corporation assessment; appeals of orders of necessity. Under the bill, a drain commissioner (or drainage board) could find that a public corporation would receive "benefits at large for public health, safety, or welfare" (though Section 104 refers to a drainage board determining whether a portion of the costs was necessary for the public health, safety, or welfare "or for agriculture," presumably the reference to agriculture is not correct) and, therefore, that the public corporation would be liable for a portion of the costs of constructing the proposed drain. [Sections 54 and 104] Within 7 days after an order of necessity were filed, a drain commissioner or drainage board would have to notify by first-class mail each public corporation identified in the order as "receiving benefits at large for public health, safety, or welfare" that it was liable to pay a percentage of the costs of constructing the [proposed] drain. [Sections 56 and 106] The governing body of the public corporation would have 21 days after the notice was mailed by the drain commissioner or drainage board to appeal the finding (in the order of necessity) that all or a part of the costs of the proposed drain was necessary for public health, safety, or welfare by filing with the circuit court in the county in which the territory of the public corporation was located. [Sections 65 and 106]

Requests for circuit court review of orders by aggrieved parties. After a board of determination (or intercounty drainage board) filed either an order of "no necessity" or of "necessity," a party (including a public corporation) aggrieved by the order would have 14 days after the filing of the order in which to institute an action in the circuit court. The circuit court would determine whether the order was "authorized by law and supported by substantial, material, and competent evidence on the whole record." The review would be made on the record presented to the board of determination (or the intercounty drainage board), with no additional testimony or information allowed to be offered ("except for purposes of claim of fraud or error of law"). After the review of the record, the court could remand the matter to the board of determination or the drainage board to reconvene to secure additional testimony and evidence on issues the court considered necessary to render its decision on the appeal. Following the hearing on remand, the record would be transmitted to the court for hearing and decision. [Sections 58 and 108]

If proceedings were initiated in the circuit court, the drain commissioner would ("promptly") have to request the recorder or reporter to furnish a transcript of the board of determination proceedings to the court. Also, an aggrieved party could request – and would have to be promptly furnished with – a transcript of the proceedings at cost. [Section 52]

If a drain commissioner on an intercounty drainage board considered the apportionment between the counties to be "unfair," he or she would have to ask the director of the Department of Agriculture to review the apportionment and recommend an apportionment between the counties. If the drainage board did not adopt the director's recommendation (by majority vote), or if the director's recommendation were adopted but the drain commissioner still considered the recommended apportionment to be unfair, the drain commissioner could have the apportionment (either the drainage board's apportionment or the director's recommended apportionment) reviewed by an arbitration board of "disinterested" drain

commissioners. A drain commissioner would have 21 days after the filing of an order of necessity to file a signed “claims for review by arbitration” with the director of the department, and the bill describes how the arbitration drain commissioners would be selected and the process that would take place. [Section 109]

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, along with the Departments of Natural Resources and 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.

The current Michigan Drain Code. The following summary of the drain process under the current Drain Code of 1956 is based partly on a September 20, 1999 memorandum prepared by the Legislative Service

Bureau.

Jurisdiction over drains. At the county level, authority for drainage rests with the county-wide elected drain commissioner; and at the intercounty level, with an intercounty drainage board consisting of the drain commissioners from each county and a representative from the Michigan Department of Agriculture. County drain commissioners, with certain exceptions (namely, in counties that have opted to establish departments of public works or public improvement agencies with an elected "public works commissioner") are elected county-wide and have sole jurisdiction over drains -- and the scope of drain projects -- in their counties.

Drain projects. County drainage district are created, and drainage projects (except for maintenance projects that cost less than $2,500 per mile) are initiated, by application and petition. A minimum number of landowners ("freeholders"), or a single county health department or municipality, can apply to the drain commissioner to initiate the establishment of drainage districts and petition to initiate drainage projects.

Funding drains. Drainage projects are funded through assessments to drainage district landowners, municipalities (cities, villages and townships), and the state Department of Transportation (if the proposed drain runs along a state road). Assessments are divided among landowners, municipalities, and the state Department of Transportation (for state trunkline highways) according to the drain commissioner's determination ("apportionment") of the percentage of "benefits" (currently defined only in the water management chapter of the code) of the drain project accruing to the various landowners' lands in a drainage district. (The Drain Code refers to this apportionment of drain assessments as the "apportionment of benefits.")

Public hearings. A minimum of two public hearings are required for county drains, one before a board of determination's "order of necessity," the other the "day of review" which is when the county drain commissioner or the intercounty drainage board publicly explains the apportioning of assessments among landowners and municipalities in a drainage district. At least three public hearings are required for intercounty drains: one before designating an intercounty drainage district, one before issuing an "order of necessity," and on the "day of review".

No public hearings are required in order for a county drain commissioner to decide that a county drainage district is "practical," though one public hearing is required before a "board of determination" (so-called because it determines the "necessity" of a drain project) can issue a decision (in the form of an "order of necessity") allowing a county drain commissioner to proceed with a drain project. An intercounty drainage board must hold a public meeting both before designating a drainage district and before proceeding with an intercounty drain project. Finally, the county drain commissioner or the intercounty drainage board decides how much each party in the drainage district must pay toward covering the cost of the drain project (called an "apportionment of benefits") and holds a meeting called a *"day of review"* to explain the assessments to the landowners. A public hearing also is required if a party (a landowner or municipality) subject to drain assessments appeals the assessment to the circuit court.

Drain code "determinations" and "orders." The Drain Code process currently involves a number of specialized "determinations" and "orders" issued by county drain commissioners, county "boards of determination," and intercounty drainage boards. Before establishing a drainage district, a county drain commissioner must decide that a proposed drainage district is "practical" (a term not defined in the code) and then issue an *"order of practicality"* before proceeding to establish ("designate") the district. Once a county drainage district is established or designated, a three-member "board of determination" must decide ("determine") that a proposed drain project is "necessary and conducive to the public health, convenience and welfare" (a phrase which is not defined in the code), and issue an *"order of necessity,"* before a county drain commissioner can issue a *"first order of determination"* that designates the route and the municipalities subject to drain assessments. After the drain commissioner obtains all rights-of-way and easements, he or she issues a *"final order of determination"* that approves the project and identifies the parties to be assessed to pay for the project.

Appeals. Landowners and municipalities can appeal "necessity" decisions (made by county drain commissioners or by intercounty drainage boards) and "apportionment" decisions (that is, the imposition of assessments to pay for a drain project) to the circuit court. The circuit court appoints a "board of review" which renders a decision on the appeal after holding a public hearing.

The current county drain process. Currently, the initiation of a new county drain involves a two step process (three, if approval of the apportionment of

drain assessments is included). Chapter 3 of the Drain Code sets out an application process for establishing a new drainage district, while Chapter 4 sets out a petition process for "locating, establishing and constructing" a drain once a drainage district has been established. It currently is possible to complete the first step of the process (that is, establish a drainage district, the legal entity that can sue and be sued) without ever completing the second step of the process (that is, without "locating," "establishing," or constructing a drain). Similarly, it currently is possible to establish a drainage district and to "locate" and "establish" a drain without ever beginning any actual construction of the drain. Thus a "drain" may be "visible" only in the sense that it once was "located" and "established" on paper. (Chapter 7 of the Drain Code, "Apportionment and Review," details the drain process from the issuing of the "final order of determination" through the apportionment of costs and the review and appeal of such apportionments.)

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 would define "benefit" in Chapter One, a 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 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 land uses. 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 feasible 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 it is true that the bill, for the first time, would define "benefit" in Chapter One, there are several problems with this definition. In the first place, "benefit" already is defined in the water management chapter of the code (Chapter 22), and although, presumably, the Chapter 22 definition is intended to apply only to that chapter (and not to the "apportionment of benefits" that determines a landowner's assessment for a drain project), the code nowhere says this. So it could be argued that the code already has a definition of "benefit" that makes this second, new definition redundant and unnecessary.

However, even were it statutorily clear that a second definition of "benefit" were needed, the definition proposed in the bill is problematic. Unlike the existing definition, the proposed definition includes not only the positive impacts of drains but possible negative impacts as well. This inclusion of negative impacts in a definition of "benefit" not only is counterintuitive, but could further result in the undesirable effect of requiring private landowners – and, for the first time, "public corporations" – to pay for the negative impacts of drain projects on private or public lands. While it could be argued that the bill still would require a determination of the "necessity" of a drain project based on the drain's being "necessary and conducive for the public health, safety, or welfare or for agriculture" (instead of, as currently, "the public health, convenience, and welfare") before a drain project went forward, there still are problems.

First, there still is no requirement in the bill that the benefits of drain projects outweigh the costs – including the costs of negative impacts – of the project, something that at least some other states require (see BACKGROUND INFORMATION). If people and public corporations (whose revenues come from taxpayers) are to be forced to pay for drain projects that they neither want nor need, then at a minimum the bill should guarantee that the public benefits of the project outweigh the private and public disadvantages of the project. The bill would allow county boards of determination to decide that a proposed drain project was "practical" before deciding on whether it were necessary, and would allow county drain commissioners to decide whether a proposed project were "feasible" (and to reject a petition for a proposed drainage district and drain if he or she decided that the project weren't "feasible"), but the bill never defines the basis on which such decisions of practicality or feasibility would be based. Adding a cost-benefit requirement would clarify not only the terms themselves, but the drain petition process as a whole.

Secondly, the proposed new definition of "benefit" actually includes within it the notion of "harm." For the proposed definition would define "benefit" to mean not only the *positive* impacts of a drain project on individual parcels of land in a drainage district, but also *negative* impacts such as a decrease in "natural resources values" and an increase in flooding. Since drain special assessments are based on the drain commissioner's (or drainage board's) apportionment of "benefits," the new definition would mean that a private landowner in a drainage district, who may not have wanted a drain project in the first place, not only could have his or her land harmed by the project (which currently reportedly is not an infrequent consequence of existing drains and improvement projects), but that landowner would be required to pay for those very harms to his or her lands because technically, under the bill, those harms would be called "benefits." This is wrong.

Finally, an amendment to the bill made on the floor of the House raises a potential constitutional issue. Currently, the Drain Code bases the "necessity" of a proposed drain on whether the drain is necessary for the "public health, convenience, and welfare." As reported from the House committee, the bill would have based the necessity of a proposed drain on whether the drain was needed for "the public health, *safety, or* welfare." But as amended on the floor of the House, the bill now would base necessity not only on the public criteria of public health, safety, or welfare,

but also on a private sector criterion, namely, if the proposed drain also were needed "for agriculture." Although historically the Drain Code was used primarily to benefit private agricultural enterprises, the criteria for determining the necessity of a drain have been based on the public good. So the bill currently, and for the first time, would explicitly allow use of the exercise of governmental power of eminent domain – which allows the government to "condemn" and take private lands for public purposes – to be used for benefits to the private sector. (Section 7 of the bill would, as currently, allow property or a property interest to be acquired by a county drain commissioner or an intercounty drainage board, by "gift, grant, dedication, purchase, or *condemnation*," emphasis added.) *Black's Law Dictionary* defines "eminent domain," in part, as "the power to take private property for public use by the state . . . founded in both the federal (Fifth Amendment) and state constitutions (Article X, Section 2 of the Michigan constitution says that *"Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."*). However, the Constitution limits the power to taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners of the property which is taken. The process of exercising the power of eminent domain is commonly referred to as 'condemnation', or, 'expropriation'. If the bill would, indeed, allow the exercise of the governmental power of eminent domain to take private land to benefit private land, then the bill could raise a serious constitutional issue.

Response:

Historically, the Drain Code has been used for purposes which clearly further the public health (in the case of drainage of wetlands that served as the breeding grounds for malaria-bearing mosquitoes in the nineteenth century) and the public "convenience" (for example, drainage to maintain public roadways). But the main purpose of the Drain Code, at least until the post-World War II boom in commercial and residential development, clearly always has been to benefit agriculture. And though benefits to private agricultural enterprises -- and, later, private developers -- could be seen as benefits to the private sector paid for by public funds (in the form of drain taxes or, later, drain assessments), it also could be argued that agriculture has been and continues to be so vitally important to the state economy as a whole that in a broad sense the government's power of condemnation given to drain commissioners under the Drain Code does serve a general public welfare purpose. Thus, the proposed inclusion of an explicit reference to agriculture in the determination of the "necessity" of a drain project could be seen as just putting into statute the purpose for which the Drain Code has been used all along and as furthering the public interest in a general way.

Reply:

The above argument, if true, could equally be applied to other private economic sectors important to the state, including commercial and residential development, one of the major uses to which the Drain Code is put today. So why not add commercial and residential development to the bases on which a drain project could be determined to be necessary?

For:

For the first time, the bill would include in the Drain Code consideration of the impact of drain projects on natural resources. It would include a general requirement that any drain construction or improvement project include an evaluation of the impacts of the project on natural resources and identify appropriate measures to minimize adverse impacts. House floor amendments would further specify that "in new drains, improvements, and maintenance projects," water quality be protected, impacts on lands or interests in lands (including easements owned for preservation or conservation purposes) be avoided, minimized, and mitigated; and "applicable management practices" be used. The bill also would allow petitioners for new drain projects to request -- and drain commissioners themselves to consider on their own initiative-- natural resources in the Drain Code process. For example, in the chapters (Chapters 3 and 5) 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 that were intended to enhance or improve the natural resource values of the drain and that provided direct benefit to the proposed drain. Later in the county drain process, after a drain commissioner filed a "first order of determination", he or she would have to 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 and that identified appropriate practical measures to minimize adverse effects. In fact, this evaluation wouldn't even have to be part of the engineering analysis; instead, it could be prepared by the drain commissioner himself or herself or by another qualified professional. In addition, after a drain commissioner convened the informational meeting that would be required once a board of determination had determined that a drain was necessary, the bill would require the drain commissioner to obtain any permits required under the Natural Resources and

Environmental Protection Act. Finally, the drain commissioner, at his or her discretion, would statutorily be allowed 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 those measures (unlike those requested in a petition) would not benefit the drain itself. However, the bill also would protect drainage districts financially by prohibiting payment from drain special assessments for any costs associated with implementing natural resources measures initiated by a drain commissioner. Instead, the bill would require that any such natural resources enhancement measures be paid out of gifts, donations, grants, contracts, or any combination of these funding sources. These provisions are unprecedented in the history of the Drain Code and would provide a solid foundation for beginning to address environmental concerns in the Drain Code.

Response:

The bill would offer no more protection to the environment than the current version of the Drain Code does, since the new provisions regarding "natural resources" (or "natural resource values") do not mandate that any action be taken other than "evaluation" and "identification" of certain ("appropriate" or "appropriate practical") measures to minimize the "adverse effects" of a proposed drain project. Since county drain commissioner and intercounty drainage boards are not prohibited from doing this already under the current Drain Code, these proposed changes would not address the current absence of any environmental protections in the code.

The bill mentions "natural resources" or "natural resource values" (which it does not define) in four contexts. However, both times that the bill mandates "consideration" of "natural resources," it does not require that any other action be taken. The other two references in the bill -- which are to "natural resource values" -- don't even require that consideration be given to natural resource "values," much less require that any other action be taken.

Obviously, drain commissioners and drainage boards already could (and some reportedly do) "consider" the impact of drain projects on "natural resources." What is at issue, however, is requiring that all drain projects -- including new construction, "improvements," and maintenance -- meet minimal environmental protection standards. The current Drain Code does not do this, nor would the bill do this. While it could be argued that it is better to at least mention "natural resources" or "natural resource values" than to fail to mention them or the environment at all, the bill's proposed provisions still would do nothing to *require* any environmental protection in under the Drain Code. And without a clear statutory requirement that all drain work include environmental protection the bill would not change the current ability of drain commissioners and drainage boards to continue to effectively ignore at will and with impunity the environmental damage caused by drain projects.

Against:

While the bill may indeed streamline the process for initiating and implementing drain projects, it also fails to address 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 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, 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 for citizens to stop them once they've started (though drain commissioners can, in fact, now "stop" a project simply by failing to act on a petition). Moreover, even though much discussion focuses on 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 collapsing the current two-step petition process (one for a drainage district, another for the actual project) into a single petition process and, presumably, by reducing the special assessment burden on private landowners by levying drain assessments against other state agencies (notably the Department of Natural Resources), colleges and universities, and other local taxing authorities, including junior and community colleges.

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 or petitioned for (since the drain commissioner has sole and exclusive authority over the scope of any project), and rightly fear initiating any drain projects for fear of setting this out-of-control process in motion. The bill would perpetuate this state of affairs by explicitly saying that the "scope" of a drain project was within the sole authority of drain commissioners and drainage boards ("in consultation with [their] engineers or other qualified professionals"). So 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 and intercounty drainage boards, 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 (or any other outside agencies) 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 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.

Against:

The bill could prove to be financially costly for counties. Currently, under the two-step process, a county board of commissioners can tell a drain commissioner to reject any application for the establishment of a drainage district that wasn't accompanied by a cash deposit. Only if a drainage district is established can the process then move forward to the next step, the petitioning process for establishing and constructing a new drain.

But under the proposed one-step petition process, the county board of commissioners conceivably could be

unaware that someone had initiated a petition and, therefore, could wind up paying for a potentially costly aborted drain process because it had not known that such a process had been initiated and so had not instructed the drain commissioner about cash deposits from the petitioner. The Drain Code does not, nor would the bill, require a drain commissioner to notify the county board of commissioners as soon as a petition was filed, and so by the time the county board of commissioners even became aware of the existence of a petition it might be too late for the county board to avoid having to pay the costs to the drain commissioner's office of the process. Without a requirement for immediate notification to a county board of commissioners when a petition were initiated, counties could wind up paying for costs of aborted drain code projects simply because they had not known in time to instruct the drain commissioner to require a cash deposit.

Counties could also wind up having to pay for costs not covered by petitioners who had paid cash deposits, since the bill would not require a specific amount for a cash deposit. Instead the bill would require that a cash deposit "equal the drain commissioner's *reasonable estimate* of the costs to be incurred by the office of drain commissioner in proceedings under this chapter until the entry of an order of no necessity or an order of necessity" (emphasis added). If a drain commissioner's "reasonable estimate" grossly underestimated the costs, counties would be saddled with potentially very expensive bills.

Against:

The bill could have Headlee implications. For, by expanding the basis on which drain projects for which local units of government could be assessed, the bill would thereby mandate new costs to local units. Currently, local municipalities – cities, villages, and townships – are assessed a percentage of the cost of a drain project only if the drain is necessary for the public health. Under the bill, however, a drain could be found necessary for public health, safety, or welfare, and a "public corporation" – which would include not just cities, villages, and townships but also counties, colleges, universities, and junior and community colleges and school districts – would then be liable for paying for a portion of the costs of that drain project. But under Headlee, if the state mandates new costs for local units of government, then the state has to pay for those costs. If, as it appears, the bill would mandate new costs to local units of government, then it would violate the Headlee limitations.

Another problem with the bill is that it would impose new assessments on state departments (such as the Department of Natural Resources, which holds large tracts of land on behalf of the people of the state) and on state universities without providing for any offsetting revenue streams for these entities. In the case of assessing state departments, like the Department of Natural Resources, however, not only would a local, county level official be imposing assessments on an already taxpayer-funded entity, it also would impose drain assessments on lands that almost by definition would not be benefitted (in the normal sense of the term) by being drained. While commercial and residential land developers and farmers might need their land drained, draining state wetlands could be environmentally disastrous, and nothing in the bill would prevent this. In fact, the bill would add insult to injury by then assessing such state lands for the harm done to them. In the case of state universities, moreover, by imposing new costs without providing new state revenues to offset these costs, the bill could result in increases in university student tuition and fees, since the two major revenue streams for state universities come from state appropriations and from student tuition and fees. At a time when virtually everyone seems to agree that if students from other than wealthy families are going to be able to afford to go to college, tuition and fee increases should be kept as low as possible. The bill could result in increased costs to students who already are struggling financially.

Against:

Eliminating the current two-step Drain Code process, while requiring that drainage districts pay costs incurred in certain drain petition proceedings that ultimately were aborted, could be a problem. Proponents of the bill argue that collapsing the current procedure, in which a drainage district must first be established before a petition for a drain can be initiated, would "streamline" the current process. But by eliminating the establishment of a drainage district before allowing a petition to initiate a drain project, the bill would postpone the establishment of the legal entity -- the drainage district -- that the bill appears to want to make responsible for the costs of drain petition processes that were aborted before a drainage district is established. Thus, the petition process could proceed – and costs could be incurred – without any body corporate being in legal existence to take responsibility for paying for these costs. If this turns out to be the case, who would pay? Would the county have to absorb these costs?

The bill does refer to what it calls a "tentative drainage district," the boundaries of which a board of determination or an intercounty drainage board would

specify in an "order of practicality," and the bill would

appear to authorize a county board of determination or an intercounty drainage district to "establish" a "tentative drainage district." Yet the definition of "drainage district" in the bill does not mention "tentative drainage district." However, the definition does include a reference to "proposed drains" and the area that would be drained by such drains. The bill would define "drainage district" to mean "the area described in [a] final order of determination, or, *for a proposed drain for which a final order of determination ha[d] not been made, the area that would be drained by the proposed drain.*" (Emphasis added.) Under the proposed definition, once a drainage district were established, it would be "a body corporate with power to contract, to sue and be sued, and to hold, manage, and dispose of real and personal property, in addition to any other powers conferred upon it by law." The question remains whether a "tentative drainage district" would qualify as this kind of body corporate, and, if it did not, the question then would be how the bill could authorize the assessment of lands in "tentative drainage districts" as though those lands were in an established drainage district.

POSITIONS:

The Department of Agriculture supports the bill. (1-12-00)

The Michigan Farm Bureau supports the bill. (1-12-00)

The Michigan Association of Drain Commissioners supports the bill. (1-13-00)

The County Road Association of Michigan supports the bill. (1-20-00)

The Michigan Association of Realtors supports the concept of the bill. (1-20-00)

The Michigan Drain Coalition opposes the bill. (1-6-00)

The Michigan Land Use Institute opposes the bill. (1-6-00)

The Citizens' Committee for Drain Code Reform (a statewide coalition of farmers) opposes the bill. (1-6-00)

The Michigan Farmers Union opposes the bill. (1-6-00)

The Michigan League of Women Voters opposes the bill. (1-10-00)

Taxpayers United opposes the bill. (1-10-00)

The Detroit Audubon Society opposes the bill. (1-12-00)

The Dwight Lydell (Michigan) Chapter of the Izaak Walton League (a conservation group) opposes the bill. (1-14-00)

The Michigan United Conservation Clubs opposes the bill. (1-19-00)

The West Michigan Environmental Action Council opposes the bill. (1-19-00)

The Public Interest Research Group in Michigan (PIRGIM) opposes the bill. (1-19-00)

The Michigan Environmental Council opposes the bill. (1-20-00)

Clean Water Action of Michigan opposes the bill. (1-20-00)

The Mackinac Chapter of the Sierra Club opposes the bill. (1-26-00)

The Michigan Association of Homebuilders opposes the bill. (1-25-00)

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.