House
Legislative
Analysis
Section

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SUBMERGED LOG RECOVERY

House Bill 5690
Sponsor: Rep. Scott Shackleton

House Bill 5691
Sponsor: Rep. Judith Scranton

Committee: Great Lakes and Tourism

Complete to 5-8-00

A SUMMARY OF HOUSE BILLS 5690 AND 5691 AS INTRODUCED 4-27-00

House Bill 5690 would add a new part (Part 326) to the Natural Resources and Environmental Protection Act (NREPA), "Great Lakes submerged logs recovery," that would explicitly lay state claim to all submerged logs and prohibit the removal of submerged logs from bottomlands without a permit from the Department of Environmental Quality (DEQ). The bill also would amend the Great Lakes Submerged Lands part (Part 325) of the NREPA to, among other things, prohibit the removal of noncommercial logs from the Great Lakes or bottomlands. House Bill 5691 would add two new sections to the NREPA to create a "submerged log recovery fund" and a "Great Lakes fund."

House Bill 5690 would add two new sections to the Natural Resources and Environmental Protection Act (MCL 324.32610 and 324.32611) to create two new funds in the state treasury: the submerged log recovery fund and the Great Lakes fund. On December 1, 2001, and on December 1 of each following year, the state treasurer would transfer half of the balance of the submerged log recovery fund to the Great Lakes fund and half to the Forest Development Fund. The state treasurer could receive money or other assets from any source for deposit into each fund, would direct the investment of each fund, and would credit to each fund the interest and earnings from the fund's investments.

Money from the submerged log recovery fund would be used, upon appropriation, for the administrative costs to the Departments of Environmental Quality, Natural Resources, and State of implementing the new Part 326 proposed by House Bill 5691 (see below). Until December 1, 2001, money in the submerged log recovery fund would remain in the fund and not lapse into the general fund.

The Department of Environmental Quality would expend money from the Great Lakes fund, upon appropriation, only for environmental projects related to the Great Lakes and areas contiguous to the Great Lakes. Money in the Great Lakes fund at the close of the fiscal year would remain in the fund and not lapse to the state general fund.

Submerged log recovery. The bill would reserve to the state title and ownership of all submerged logs lying on, over, in or under "unpatented" bottomlands, and require a permit from the Department of Environmental Quality (DEQ) in order to remove submerged logs from bottomlands. The bill would exempt "noncommercial logs" (see below) from the permitting requirement, and allow the DEQ, with the permission of the lawful owner of the submerged patented lands, to issue a permit to a person for the removal of submerged logs from submerged patented lands.

Definitions. The bill would define "submerged log" to mean "a portion of the trunk of a felled tree that ha[d] not been further processed for any end use and [was] located on, in, over, or under bottomlands." "Bottomlands" would mean "land in the Great Lakes, and bays and harbors of the Great Lakes, lying below and lakeward of the ordinary high water mark." (The bill, like the act, would include Lake St. Clair under the term "Great Lakes.") "Noncommercial logs" would be defined in Part 325 to mean "a portion of a tree that [was] located in the Great Lakes or on bottomlands that the [DEQ] determine[d] pose[d] a navigational or safety hazard or [was] of no or little commercial value." The bill also would define "patented lands" to mean "any bottomlands lying within a specific government grant area, including a private claim patent or a federal patent."

Submerged log removal permit applications. For calendar year 2000, the DEQ would establish a time period for the submission of applications for submerged log removal permits. Beginning in 2001, applications could be submitted between January 1 and January 31 of each year thereafter.

Applications would have to be submitted in writing on a form provided by the department, and would have to include all of the following:

• A $4,000 application fee;

• A description ("by Loran-C, GPS, or attitude and longitude") of the proposed bottomland log removal area, which would have to be square or rectangular and no larger than 40 to 160 contiguous acres;

• A description of the methods to be used to raise the submerged logs, the time of year the logs would be raised, and the procedures by which the logs would be transferred to the shore;

• Identification of any adverse environmental impacts associated with the proposed submerged log removal method, and of the steps proposed to mitigate any such impacts;

• Any other information that the DEQ considered necessary to evaluate an application.

An application would not be complete until all of the information requested on the form, as well as any other information requested by the DEQ, had been received. The DEQ would have to notify an applicant in writing when an application were deficient, at which time the applicant would have 30 days to submit the requested information. If an applicant failed to respond within 30 days, the department would have to deny the permit unless the applicant requested, and the department approved, an extension based on the applicant's "reasonable justification" for the extension.

When the DEQ received an application for a submerged log removal permit, it would have to place the application on notice for 20 days for review and comment, and submit copies of the application to the Departments of Natural Resources and State for their review and comment.

Conditions of issuance. The DEQ would be required to review each application, and would be prohibited from issuing a permit unless the department determined both (a) that any adverse impacts ("including, but not limited to, impacts to the environment, natural resources, riparian rights, and the public trust") were "minimal" and would be mitigated to the extent "practicable," and (b) that the proposed activity would not unreasonably affect the public health, safety, and welfare. Based on adverse impacts ("including, but not limited to, adverse impacts to the environment, natural resources, riparian rights, and the public trust"), the DEQ could refuse to allow the removal of submerged logs from certain areas described in an application.

The bill also would prohibit the DEQ from authorizing the same bottomland log removal area in more than one submerged log removal permit at any one time. The department would be able to modify the boundaries of a proposed area in a permit to avoid both overlaps with other active submerged log removal permits and adverse impacts.

Submerged log removal permit. Each submerged log removal permit would have to include a submerged log removal plan approved by the DEQ. Each permit also would have to contain terms and conditions that the DEQ had determined would protect the environment, natural resources, riparian rights, and the public trust. Permits could be for up to five years, though, at the written request of the applicant at least six month before a permit expired and at the discretion of the DEQ, a permit could be extended for an additional two years upon payment of a $500 "processing fee." (Processing fees so received would be forwarded to the state treasurer for deposit into the submerged log recovery fund.) Permits couldn't be transferred unless the DEQ approved the transfer in writing.

Applicants for submerged log removal permits would have to provide a $100,000 performance bond, acceptable to the DEQ, before the department issued a permit. The performance bond would have to ensure compliance with the permit for the period of the permit or until the authorized submerged log removal had been completed to the satisfaction of the DEQ and all required payments for the fair market value or each submerged log had been made. The department could draw on the performance bond for delinquent payments for the removed logs' fair market value.

Termination of permits. When a permit terminated and the DEQ were satisfied that the permittee had complied with the permit's terms and conditions, the department would have to issue a written statement releasing the permittee and bonding company. A permittee could request in writing, and the DEQ could grant, termination of a submerged log removal permit before the permit's expiration date, including release from quarterly reports and performance bond requirements.

Fair market value payments The bill would reserve to the state a payment of 30 percent of the fair market value of each submerged log that was removed from unpatented lands. Within six months after the bill took effect, the DEQ would conduct a study to determine the fair market value of submerged logs to provide a basis for these payments. The study could be updated as the department determined necessary. The DEQ could do the study and updates itself or contract out with a qualified person to do them.

Quarterly reports and payments. Someone holding a submerged log removal permit would be required to provide the DEQ with a detailed report and all required fair market value payments within 30 days after the close of each calendar quarter. The report would have to include an accurate scaling of all submerged logs removed, by species. The permit holder would be required to use a department-approved independent agent to conduct the scaling and species determination.

All payments received for fair market value would be forwarded to the state treasurer for deposit into the submerged log recovery fund. After a permit holder had been notified in writing that a payment was overdue, the DEQ could order the permit suspended until payment were submitted in full, and the permit holder could not resume submerged log removal operations until the department had provided written authorization.

Departmental powers. The DEQ could promulgate rules to implement the bill's provisions, and could hold public hearings on applications for submerged log removal permits if (a) the department wanted additional information before making a decision on the permit application, or (b) upon request, if the request were made within the 20-day public notice period.

The DEQ could bring a civil action against a person, in Ingham County Circuit Court or in the circuit court of the county in which a violation occurred, to do one or more of the following:

• Enforce compliance with, or restrain a violation of, the proposed Part 326 and the rules promulgated under it;

• Enjoin the further performance of, or order the removal of, any project that was undertaken contrary to the proposed Part 326 or the rules promulgated under it;

• Enforce a permit issued under the proposed Part 326; or

• Order the restoration, to its prior condition, of an area affected by a violation of the proposed Part 326 or the rules promulgated under it.

In addition to any other relief granted, the circuit court, in an action brought under this section of the bill, could assess a civil fine of up to $5,000 per day for each day of a violation, though any civil fine or remedy assessed, sought, or agreed to by the DEQ would have to be appropriate to the violation. Civil fines recovered under this section of the bill would be forwarded to the state treasurer for deposit into the submerged log recovery fund.

Remedies for aggrieved parties. Within 60 days of the DEQ's decision, an applicant for a submerged log removal permit or a riparian owner who was aggrieved by an action or inaction of the DEQ could request a formal hearing on the matter under the Administrative Procedures Act.

Violations, penalties, remedies. A person would be guilty of a misdemeanor, punishable by a fine of up to $10,000 per day for each day of the violation, if the person did any of the following:

• Violated the bill's proposed Part 326 provisions or a rule promulgated under the proposed part;

• Violated a permit issued under the proposed part;

• Made a false statement, representation, or certification in an application for or with regard to a permit or in a notice or report required by a permit;

• "Rendered inaccurate" any monitoring device or method required to be maintained by a permit.

In addition to the misdemeanor fines, a court would be required (a) to order a person convicted under this part of the bill to return to the state any logs removed from bottomlands in violation of this part of the bill or the rules promulgated under this part of the bill, or (b) to compensate the state for the full market value of the logs. If the person convicted under this section of the bill had been issued a permit under this proposed part of NREPA, the permit would be void as of the date of the conviction.

Great Lakes Submerged Lands. Part 325 of NREPA regulates uses, including uses by marinas, of submerged or filled-in bottomlands of the Great Lakes that might restrict or prevent the free public use of these lands. The bill would make a number of amendments to this part of NREPA as described below.

Waterway enlargement permits. The act currently requires the DEQ to issue permits authorizing the enlargement of waterways if the department finds that the following conditions are met: the project will not injure the public trust or interest including fish and game habitat, the project conforms to the requirements of law for sanitation, and no material injury to the rights of any riparian owners on any body of water affected will result. The permit must provide that the artificial waterway is a public waterway, except intake or discharge canals or channels on property owned, controlled, and used by a public utility.

The bill would strike these provisions and rewrite them to say that the department could not issue a permit under this part of NREPA unless it had determined all of the following:

(1) That the need for the proposed work had been clearly demonstrated;

(2) That the proposed work was "water dependent";

(3) That the impacts from the proposed work ("including, but not limited to, impacts to the waters, public trust, natural resources, navigation, and adjacent riparian owners") was minimal and mitigated to the extent practicable;

(4) That no feasible and prudent alternatives were available. An alternative would be "feasible and prudent" if it were practicable and capable of being done with existing technology and at a similar cost or a reasonable cost increase, and would have less impact on the waters, public trust, natural resources including coastal processes, navigation, and adjacent riparian property owners.

Applicants would be required to demonstrate that, given all pertinent information, there were no feasible and prudent alternatives that had less impact on the waters, public trust, natural resources, navigation, and adjacent riparian property owners.

The bill would allow the DEQ to require a person proposing to undertake an activity that required a permit to provide a performance bond or other acceptable guarantee before issuing a permit for projects with the potential for significant impact or to ensure the applicant satisfactorily completed the project during the period of the permit.

Finally, the bill would delete the current requirement that the existing and future owners of land fronting on the artificial waterway are liable for maintenance of the waterway in accordance with the conditions of the permit.

Prohibited activities. The act specifically prohibits certain activities without a permit. These non-permitted activities include constructing marinas or connecting artificial canals, ditches, lagoons, ponds, lakes, or other ("similar") waterways with any of the Great Lakes, including Lake St. Clair (or working on such waterways in order to connect them to the Great Lakes). However, a permit is not needed for "boat wells and slips facilitating private, noncommercial, recreational board use, not exceeding 50 feet in length where the spoil is not disposed of below the ordinary high water mark of the body of water to which it is connected."

The bill would add a prohibition against the removal of noncommercial logs from the Great Lakes or bottomlands without a permit, and would rewrite the current exemption to say that a person would not be required to obtain a permit for either (a) "seasonal, private, noncommercial docks and boat hoists" or (b) maintenance of a structure constructed under a permit issued under this part of NREPA if the maintenance is in place and in kind with no design or materials modification.

Permits and unpatented lands. Currently, the Natural Resources and Environmental Protection Act requires that before the DEQ acts on an application for a deed or lease to unpatented lands or agreement for use of water areas over unpatented lands, the applicant secure approval of or permission for his or her proposed use of the lands or water area from (a) any federal agency as provided by law, (b) the department, and (c) the legislative body of the appropriate local unit of government. The DEQ cannot issue or enter into such a deed, lease, or agreement without such approval or permission.

The bill would amend this provision to eliminate the prohibition against the DEQ from entering into such a deed, lease, or agreement without the approval or permission of the federal, state, and local governments and instead substitute notification by the DEQ for the current required approval of or permission. More specifically, when the DEQ received an application for a "conveyance" of (instead of, as currently, "a deed or lease to") unpatented lands or an agreement for use of water areas over patented lands, the department would be required to notify the United States Army Corps of Engineers, the Department of Natural Resources, and the legislative body of the appropriate local unit of government.

Currently, upon receiving an application, the DEQ is required to mail copies to

• the Department of Public Health (now the Department of Community Health),

• the clerks of the county, city, village, and township, and the drain commissioner (or, if there is no drain commissioner, to the road commissioner), of the county in which the project of body of water affected is located, and

• the riparian owners.

Along with the copies, the department must mail a statement that unless a written objection is filed with the department within 20 days after the mailing of the copies, the department may take action to grant the application.

The bill would amend this requirement to add to the list the Department of Natural Resources, and to exempt from this mailing requirement "activities included in the minor project category as described in rules promulgated under this part." The bill also would allow the DEQ to issue a conditional permit before the 20-day comment period expired if the department determined that an emergency existed.

This section of the act allows the department to require an applicant to furnish an abstract of title and ownership, and a 20-year tax history on the riparian or littoral property in question. The bill would amend this to allow the DEQ instead to require applicants to furnish an abstract of title or title insurance policy.

The act currently requires that the $50 application fee be deposited with the state treasurer to the credit of the state's general fund. The bill would amend this provision to, instead, required that the $50 application fee be forwarded to the state treasurer for deposit into the Land and Water Management Fund (MCL 324.30113).

The bill would eliminate several provisions that authorize the DEQ to take certain actions, including the following:

• to permit, by lease or agreement, the filling in of patented land and unpatented submerged lands;

• to permit permanent improvements and structures after finding that the public trust will not be impaired or substantially injured;

• to issue deeds or enter into leases if the unpatented lands applied for have been artificially filled in or are proposed to be changed from the condition that exists on October 14, 1955, by filling, sheet piling, shoring, or by any other means, and such lands are used or to be used or occupied in whole or in part for uses other than existing, lawful riparian or littoral purposes.

The bill also would delete a current provision that requires applicants to pay to the state the fair cash value of unpatented lands where the application is for the purpose of flood control, shore erosion control, drainage and sanitation control, or to straighten irregular shore line and the lands applied for have not been filled in or in any way substantially changed from their natural character at the time the application is filed with the DEQ. [MCL 324.32505]

Oil and gas drilling. Currently, Part 325 of NREPA gives the Department of Environmental Quality (through an executive order transfer, E.R.O. No. 1995-16) authority to permit drilling operations for oil or gas when the drilling operations originate from locations above and inland of the ordinary high-water mark. The bill would transfer this authority back to the Department of Natural Resources.

Violations, penalties. Currently, someone who fails to obtain a required permit or who violates a permit commits a "minor offense" and is guilty of a misdemeanor punishable by a fine of up to $500 for each violation. Except for these minor offenses, a person who excavates or fills in or in any manner alters or modifies any of the land or waters subject to this part of NREPA without DEQ approval is guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of up to $1,000, or both.

The bill would change the penalties for violations other than minor offenses, dropping the term of imprisonment and increasing the maximum fine to $10,000 per day for each day of any of the following violations:

• violating Part 325 or a rule promulgated under it;

• violating a term or condition of a permit or a conveyance under Part 325;

• making a false statement, representation, or certification in an application for or with regard to a permit or a conveyance under Part 325 or in a notice or report required by a permit or a conveyance under Part 325;

• rendering inaccurate any monitoring device or method required to be maintained by a permit under Part 325.

Riparian lakeward boundaries. Currently, a riparian owner may apply to the DEQ for a certificate indicating the location of his or her lakeward boundary or indicating that the land involved has built up naturally or as the result of the placement of a lawful, permanent structure. The application fee for such a certificate currently is $200. The bill would increase the fee to $500 and require the DEQ to forward these fees to the state treasurer for deposit into the Land and Water Management Permit Fee Fund.

Departmental powers. The DEQ could bring a civil action against a person, in Ingham County Circuit Court or in the circuit court of the county in which a violation occurred, to do one or more of the following:

• Enforce compliance with, or restrain a violation of, Part 325 and the rules promulgated under it;

• Enjoin the further performance of, or order the removal of, any project that was undertaken contrary to Part 325 or the rules promulgated under it; or

• Order the restoration, to its prior condition, of an area affected by a violation of Part 325 or the rules promulgated under it.

Other provisions. Among other things, the bill would eliminate the DEQ's ability to permit the filling in of patented submerged lands; instead, the bill would allow the department to enter into agreements pertaining to unpatented lands or to waters over submerged patented lands (instead of, as currently, "agreements pertaining to waters over and the filling in of submerged patented lands"). The bill also would delete the current requirement that riparian owners obtain a permit from the department before dredging or placing spoil or other materials on bottomland. [MCL 325003(2)]

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■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.