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SFA**BILL ANALYSIS**

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Senate Bill 651 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Ken Sikkema
Committee: Natural Resources and Environmental Affairs

Date Completed: 10-11-00

RATIONALE

According to the Department of Environmental Quality (DEQ), sediment is the greatest pollutant by volume entering the State's lakes and streams. Erosion and excess sedimentation result in loss of fertile topsoil, filling of lakes and streams, increased flooding, impact on water quality, damage to plant and animal life, and structural damage to buildings and roads. With the rapid growth of homes and industries in Michigan, construction apparently is one of the major causes of accelerated soil erosion and sedimentation. Reportedly, without proper planning and management of soil erosion prevention and sedimentation controls, every acre under construction can potentially cause the wash-off of up to 65 to 70 tons of sediment per year into nearby lakes, streams, wetlands, and county drains. Once the sediment is in a drain or drainage system, the load evidently is carried to the Great Lakes or must be cleaned from the drainage system at a significant cost.

Currently, a permit is required for any earth change that disturbs one or more acres, or is within 500 feet of a lake or stream (although plowing and tilling for crop production, and specific logging and mining activities, do not require permits). An applicant for a permit must submit a soil erosion and sedimentation control plan. Typical elements of such a plan for construction activities include temporary diversions to channel upslope run-off around the disturbed site, and sediment removal devices such as a silt fence, or sediment trap or basin to treat the sediment-laden run-off downslope of the site. Currently, local units are primarily responsible for issuing and enforcing these permits. Apparently, DEQ audits have indicated a widespread discrepancy between various local programs in which certain local enforcement agencies have implemented well-managed and effective soil erosion programs while others lack in the development of quality programs. Some people believe that DEQ review and approval of local soil erosion programs would bring consistency to the local level and provide higher and more rigorous soil erosion and sedimentation control standards.

Currently, it is a State civil infraction subject to a \$500 maximum fine to conduct regulated earth changes without a permit or in violation of permit conditions or Part 91 of the Natural Resources and Environmental Protection Act. Many people believe this penalty is insufficient and should be increased to encourage more compliance with soil erosion and sedimentation control measures.

CONTENT

The bill would amend Part 91 (Soil Erosion and Sedimentation Control) of the Natural Resources and Environmental Protection Act to require the Department of Environmental Quality to review a county's, municipality's, or public agency's soil erosion and sedimentation control program and approve or disapprove of the program; allow a county board of commissioners to provide for soil erosion and sedimentation control by ordinance, rather than by resolution; establish a municipal or State civil infraction fine of up to \$2,500 for a violation of Part 91, a \$10,000 fine for each day a person knowingly violated Part 91 or knowingly made a false statement in an application, and a \$25,000 fine for each day a person knowingly violated Part 91 after receiving a notice; allow the DEQ to charge fees for administering a soil erosion and sedimentation control training program; create the "Soil Erosion and Sedimentation Control Training Fund"; and exempt certain metallic mineral mining activity from the permit requirements pertaining to earth changes.

A detailed description of the bill follows.

County

Ordinance. Under the Act, a county is responsible for administering and enforcing Part 91 throughout the county except within a city, village, or charter township that has in effect an ordinance conforming

to these provisions, or with regard to land uses of authorized public agencies approved by the DEQ. The bill would retain this provision but, in the exceptions, would refer to a municipality that had assumed the responsibility for soil erosion and sedimentation control (rather than a city, village, or charter township), and to earth changes of authorized public agencies (rather than land uses). (The Act defines "earth change" as a human-made change in the natural cover or topography of land, including cut and fill activities, that may result in or contribute to soil erosion or sedimentation of water; the term does not include plowing or tilling soil for the purpose of crop production. The bill would define "municipality" as a city; a village; a charter township; or a general law township located in a county with a population of 200,000 or more.)

Under the Act, a county board of commissioners, by resolution, must designate a county agency, or a soil conservation district upon concurrence of the district, as the county enforcing agency responsible for administration and enforcement in the name of the county. The resolution may set forth a schedule of fees for inspections, plan reviews, and permits and may set forth other matters relating to the administration and enforcement of Part 91 and the rules promulgated under it. The bill provides that instead of or in addition to a resolution, a county board of commissioners could provide by ordinance for soil erosion and sedimentation control in that county. An ordinance could be more restrictive than Part 91 and the rules, but could not legalize what is unlawful under Part 91 and the rules. If an ordinance were more restrictive, the county enforcing agency would have to notify a person receiving a permit that the ordinance was more restrictive than Part 91 and the rules. The ordinance would have to incorporate by reference the rules promulgated under Part 91 that did not conflict with a more restrictive ordinance, and could set forth matters that the county board of commissioners considered necessary or desirable. The ordinance could provide penalties for a violation that were consistent with the penalties provided in the bill.

Currently, a copy of a county's resolution must be forwarded to the DEQ. The bill would require a copy of a resolution or ordinance to be forwarded to the DEQ for its review and approval. The Department would have to forward a copy to the conservation district for that county for review and comment.

Department Review and Approval. The bill would require the DEQ, within three years after the bill's effective date, to conduct an initial review of each county's soil erosion and sedimentation control program under a schedule established by the DEQ. If approved, a county program would be valid for a three-year period. After the initial review, the DEQ

would have to review a county's program every three years, at least six months before the three-year period expired. The DEQ would have to approve a county's program if the county had passed a resolution or enacted an ordinance as provided in the bill; if the individuals with decision-making authority who were responsible for administering the county program had current certificates of training, as provided under the bill; and if the county had effectively administered and enforced the county program in the past three years or had implemented changes in its administration or enforcement procedures that the DEQ determined would result in the county's effectively administering and enforcing the program. In determining whether the county had met the last requirement, the DEQ would have to consider all of the following:

- Whether a mechanism was in place to provide funding to administer the county's program.
- Whether the county had conducted adequate inspections to assure minimization of soil erosion and off-site sedimentation.
- The effectiveness of the county's past compliance and enforcement efforts.
- The adequacy and effectiveness of the applications and soil erosion and sedimentation control plans being accepted by the county.
- The adequacy and effectiveness of the permits issued, and the inspections being performed, by the county.
- The conditions at construction sites under the jurisdiction of the county as documented by departmental inspections.

The DEQ would have to notify the county of the results of its review and whether the Department proposed to approve or disapprove the county's program. Within 30 days of receiving the notice, the county could request and the DEQ would have to hold an informal meeting to discuss the review and the DEQ's proposed action.

Probation. Following a meeting, if requested, and consideration of the review by the DEQ, if the Department did not approve a county's program, it would have to enter an order, stipulation, or consent agreement placing the county on probation. In addition, at any time that the DEQ determined that a previously approved county was not satisfactorily administering and enforcing its program, the DEQ would have to enter into an order, stipulation, or consent agreement placing the county on probation. During the six-month period after a county was placed on probation, the DEQ would have to consult with the county on how the county could change its administration of the program in a manner that would result in its approval.

At any time that a county was on probation, it could

request the DEQ to conduct a review of the county program. If the county had implemented appropriate changes to the program, the DEQ would have to approve the program and rescind its order, stipulation, or consent agreement that placed the county on probation.

Consultant. Within six months after it had been placed on probation, a county could notify the DEQ that it intended to hire a consultant to administer the county's program. If, within 60 days after notifying the DEQ, the county hired a consultant that was acceptable to the DEQ, the Department would have to review the county's program to determine whether it could be approved. The DEQ would have to conduct the review within one year after the county hired the consultant.

The DEQ would have to hire a consultant to administer a county's program if any of the following occurred: The county did not notify the DEQ of its intent to hire a consultant; the county did not hire a consultant within 60 days after notifying the DEQ of its intent to do so; or the county remained unapproved following the DEQ's review. Upon hiring a consultant, the DEQ could establish a schedule of fees for inspections, review of soil erosion and sedimentation control plans, and permits for the county's program that would provide sufficient revenues to pay for the cost of the contract with the consultant, or the DEQ could bill the county for the cost of the contract. (The term "cost of the contract" would mean the actual cost of a contract with a consultant plus the documented costs to the DEQ in administering the contract, but not to exceed 10% of the cost of the actual cost of the contract.)

Municipality

Ordinance. Under the Act, a city, village, or charter township may provide for soil erosion and sedimentation control on public and private land uses within its boundaries. (The bill would refer to a "municipality", rather than a city, village, or charter township, and to "earth changes", rather than land uses.) An ordinance may be more restrictive than, but may not legalize what is unlawful under, Part 91 and the rules promulgated under it. Under the bill, if an ordinance were more restrictive than Part 91 and the rules, the municipal enforcing agency (designated by the municipality) would have to give notice of that to a person receiving a permit. Currently, the ordinance may adopt by reference all or part of the rules. The bill, instead, would require the ordinance to incorporate by reference the rules that did not conflict with a more restrictive ordinance. The ordinance could provide penalties for a violation that were consistent with the penalties provided in the bill.

Department Review and Approval. As currently required, a municipality would have to submit a copy of its ordinance to the DEQ for approval, and the Department would have to forward a copy to the appropriate conservation district for review and comment. The bill also would require the DEQ to send a copy to the county enforcing agency of the county where the municipality was located.

After a date determined by a schedule established by the DEQ, but not later than three years after the bill's effective date, a municipality could not administer and enforce Part 91 or the rules or a local ordinance unless the DEQ had approved the municipality. An approval would be valid for three years. At least six-months before the expiration of each succeeding three-year approval period, the DEQ would have to complete a review of the municipality for reapproval. The DEQ would have to approve a municipality if it had enacted an ordinance that was at least as restrictive as Part 91 and the rules; the individuals with decision-making authority who were responsible for administering the program for the municipality had current certificates of training; and the municipality had submitted evidence of its ability to administer and enforce a program effectively. In determining whether the municipality had met the last requirement, the DEQ would have to consider the following:

- Whether a mechanism was in place to provide funding to administer the municipality's program.
- The adequacy of the documents proposed for use by the municipality, including application forms, soil erosion and sedimentation control plan requirements, permit forms, and inspection reports.
- Whether the municipality effectively administered and enforced the program in the past or had implemented changes in its administration or enforcement procedures that the DEQ determined would result in the municipality's effectively administering and enforcing a program that complied with Part 91 and the rules, if the municipality had previously administered a soil erosion and sedimentation control program.

In determining whether the municipality had met the requirements regarding a previous program, the DEQ would have to consider all of the following:

- Whether the municipality had had adequate funding to administer its program.
- Whether the municipality had conducted adequate inspections to assure minimization of soil erosion and off-site sedimentation.
- The effectiveness of the municipality's past compliance and enforcement efforts.
- The adequacy and effectiveness of the applications and soil erosion and sedimentation

- control plans being accepted by the municipality.
- The adequacy and effectiveness of the permits issued, and the inspections being performed, by the municipality.
- The conditions at construction sites under the jurisdiction of the municipality as documented by departmental inspection.

If the DEQ determined that a municipality was not approved or that a previously approved municipality was not satisfactorily administering and enforcing Part 91 and the rules, the DEQ would have to enter an order, stipulation, or consent agreement denying or revoking the municipality's authority to administer a soil erosion and sedimentation control program. The county program for the county in which the municipality was located then would become operative within the municipality.

Rescission. A municipality that elected to rescind its ordinance would have to notify the DEQ. Upon rescission of the ordinance, the county program for the county in which the municipality was located would become operative within the municipality. A municipality that rescinded its ordinance or was not approved by the DEQ to administer the program would retain jurisdiction over projects under permit at that time, until the projects were completed and stabilized or the county agreed to assume jurisdiction over the permitted earth changes.

Authorized Public Agency

Designation. Under the Act, a State, local, or county agency may apply to the DEQ for designation as an authorized public agency, by submitting to the Department the soil erosion and sedimentation control procedures governing all land uses normally undertaken by the agency. If the DEQ finds that a local agency's procedures are adequate, the Department may delegate to that local agency authority to approve local or county agency soil erosion and sedimentation control procedures and designate the local or county agency as an authorized public agency. The bill provides, instead, that if the DEQ found that the soil erosion and sedimentation control procedures of the State agency or the agency of the local unit met the requirements under Part 91 and the rules, the DEQ would have to designate the agency as an authorized public agency.

Violations. Currently, a county or local enforcing agency must notify the DEQ of all violations of Part 91 or the rules or violations of an ordinance, including violations attributable to a land use by an authorized public agency. The bill provides, instead, that if a local unit had notice that a violation of Part 91 had occurred within the boundaries of that local unit, including a violation attributable to an earth

change by an authorized public agency, the local unit would have to give notice of the violation to the appropriate county enforcing agency, the municipal enforcing agency, and the DEQ.

Department Approval. After a date determined by a schedule established by the DEQ, but not later than three years after the bill's effective date, a State agency or an agency of a local unit could not administer and enforce Part 91 and the rules as an authorized public agency unless the DEQ had approved the agency. The review, approval, and reapproval procedures and criteria would be as described above for approval of a municipality.

If the DEQ determined that a State agency or an agency of a local unit was not approved, or that a previously approved State agency or agency of a local unit was not satisfactorily administering and enforcing Part 91 and the rules, the DEQ would have to enter an order, stipulation, or consent agreement denying or revoking the designation of the State or local agency as an authorized public agency.

Permit Exemptions

Under the Act, Part 91 does not apply to land on which a person is engaged in the logging industry, the mining industry, or the plowing or tilling of land for the purpose of crop production or the harvesting of crops. The bill specifies, instead, that a person engaged in any of these activities would not have to obtain a permit under Part 91. All earth changes associated with these activities, however, would have to conform to the same standards as if they required a permit. The exemption from obtaining a permit would not include access to roads to and from the site where active mining or logging was taking place, or ancillary activities associated with logging and mining. In addition, the bill would not apply to a metallic mineral mining activity that was regulated under a mining and reclamation plan that contained soil erosion and sedimentation control provisions and that was approved by the Department under Part 631 (Reclamation of Mining Lands) of the Act. (As used in these provisions, the term "mining" would not include the removal of clay, gravel, sand, peat, or topsoil.)

Notice of Erosion & Sedimentation

Under the Act, if the county or local enforcing agency that is responsible for enforcing Part 91 determines that soil erosion and sedimentation of State waters has or will reasonably occur from a parcel of land in violation of Part 91, it may seek to enforce Part 91 by notifying the person who owns the land, by mail, of its determination. Currently, the notice must contain a description of specific soil erosion and sedimentation control measures that, if implemented

by the landowner, would bring the landowner into compliance and would prevent soil erosion and sedimentation of the State waters. The bill, instead, would require the notice to contain a description of the violation and what would be required to remedy the violation, and specify a time to comply with Part 91 and the rules or an applicable local ordinance. Also, the bill would refer to soil erosion or sedimentation of adjacent property or State waters.

Within five days after a notice of violation had been issued, a person who owned land subject to Part 91 and the rules would have to implement and maintain soil erosion and sedimentation control measures in conformance with Part 91, the rules, or an applicable local ordinance. (Currently, a person must implement control measures within 10 days after the notice is given.)

At least five days after a notice of violation had been mailed, if the condition of the land, in the opinion of the county or municipal enforcing agency, could result in or contribute to soil erosion or sedimentation control of adjacent property or State waters and if control measures were not in place, the county or municipal enforcing agency could enter upon the land and construct, implement, and maintain control measures conforming with Part 91 and the rules, or an applicable local ordinance. (Currently, an enforcing agency may implement control measures at least 10 days after notice has been sent.) The enforcing agency could not spend more than \$10,000 (rather than \$500, as currently provided) for the cost of the work, materials, labor, and administration without prior written notice to the landowner. If more than \$10,000 were to be spent under this provision, work could not begin until at least 10 days after the notice of violation had been mailed. (Currently, if more than \$500 is to be spent, the work cannot begin until at least 20 days after the notice has been mailed.)

Penalties

The Act prohibits a person from maintaining or undertaking a land use governed by Part 91, the rules, or an applicable local ordinance, except in accordance with Part 91, the rules, or the ordinance, and pursuant to a permit approved by the appropriate county or local enforcing agency. The bill would delete language under which a violation of this provision is a misdemeanor.

Currently, a person who owns land that is not in compliance with Part 91 and who, after notice, refuses to implement and maintain soil erosion and sedimentation control measures in conformance with Part 91 is responsible for a State civil infraction and may be ordered to pay a civil fine of not more than \$500. The bill would delete this provision.

The bill provides that if an action were brought by a county enforcing agency or a municipal enforcing agency of a local unit that had enacted an ordinance providing a penalty for violations, a person who violated Part 91 would be responsible for a municipal civil infraction of up to \$2,500. If the action were brought by the State or a county enforcing agency of a county that had not enacted an ordinance, a violator would be responsible for a State civil infraction of up to \$2,500.

A person who knowingly violated Part 91 or knowingly made a false statement in an application for a permit or in a soil erosion and sedimentation control plan would be responsible for a civil fine of up to \$10,000 for each day of violation. A person who knowingly violated Part 91 after receiving a notice of determination would be responsible for a civil fine of at least \$2,500 but not more than \$25,000 for each day the violation occurred.

If the State filed the action, the civil fine would have to be deposited in the State General Fund. If a county enforcing agency or municipal enforcing agency filed the action, the civil fine would be deposited with that county or municipality to be used to administer and enforce Part 91. If an action were filed jointly by the State and a county or municipal enforcing agency, the civil fine would have to be divided in proportion to each agency's involvement as mutually agreed upon by the agencies. All fines going to the Department would have to be deposited into the State General Fund.

A default in the payment of a fine or costs ordered under these provisions or an installment of the fine or costs could be remedied by any means authorized under the Revised Judicature Act.

In addition to a fine, a person who violated Part 91 would be liable to the State for damages for injury to, destruction of, or loss of natural resources resulting from the violation. The court could order a violator to restore the area or areas affected by the violation to their condition as existing immediately prior to the violation.

These provisions would apply to an authorized public agency, in addition to other persons. They would not apply to a county enforcing agency or a municipal enforcing agency with respect to its administration and enforcement of Part 91 and the rules.

Training Program & Fund

Beginning three years after the bill's effective date, each individual who was responsible for administering Part 91 and the rules or a local ordinance and who had decision-making authority for soil erosion and sedimentation control plan development or review, inspections, permit issuance, or enforcement, would have to be trained by the Department. The DEQ would have to issue a certificate of training to individuals if they completed a soil erosion and sedimentation control training program sponsored by the DEQ and passed an examination on the subject matter covered in the training program. The bill would delete the current requirement that individuals who are responsible for administering Part 91 complete a soil erosion and sedimentation control training program sponsored by

the DEQ within two years after they begin administering Part 91.

Under the bill, a certificate of training would be valid for five years. For recertifications, the DEQ could offer a refresher course or other update instead of the training program and examination. The DEQ could charge fees for administering the training program and the examination that were not more than the DEQ's cost of administering the program and exam. All fees collected under this provision would have to be deposited into the proposed "Soil Erosion and Sedimentation Control Training Fund".

The Fund would be created in the State Treasury. The State Treasurer could receive money or other assets from any source for deposit into the Fund. The State Treasurer would have to direct the investment of the Fund, and credit to it all interest and earnings from investments. Money in the Fund at the close of the fiscal year would remain in the Fund and not lapse to the General Fund. The Department could spend money from the Fund, upon appropriation, only to administer the training program and examination.

Educational Information

The DEQ would have to make available to the county enforcing agencies, municipal enforcing agencies, and authorized public agencies educational information on soil erosion and sedimentation control techniques and the benefits of implementing those measures. County enforcing agencies and municipal enforcing agencies would have to distribute this information to persons receiving permits under a county program or a local ordinance and to other interested persons.

Repealer

The bill would repeal Section 9102, which defines "sediment", "soil conservation district", "soil erosion", and "state agency"; Section 9103, which required the Department of Agriculture to prepare a unified statewide soil erosion and sedimentation program; and Section 9111, which requires a statement of compliance from a person who makes a preliminary plat.

MCL 324.9101 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would provide for increased fines and more severe penalties for the violation of Part 91, a rule, or

a local ordinance regarding soil erosion and sedimentation control. Stringent enforcement and meaningful penalties would bolster compliance with soil erosion and sedimentation control measures and help identify violators.

The current \$500 civil fine reflects outdated costs and is not effective in protecting State waters. It is perceived more as a warning, and many enforcing agencies evidently resort to the use of a "cease and desist" order (which stops further activity at a work site until the proper corrections and controls are installed) as the most effective compliance measure. According to the Washtenaw County Soil Erosion and Sedimentation Control division, the Great Lakes Commission reported that the cost for soil erosion dredging (removal of sediment) around the Great Lakes is \$20 million per year and 4 million cubic yards of soil are dredged annually at \$5 per cubic yard, while costs are triple per cubic yard for inland lake and stream dredging. Increased fines for a violation of Part 91 and the rules or an ordinance would help curb these cleanup costs and deter further unregulated activity.

In addition, the bill would ensure that adequate repairs were made to land and water harmed by violations of Part 91, by providing that a person would be liable to the State for the damage done to natural resources, and could be court-ordered to restore those damaged areas.

Response: It also would be helpful to add the threat of jail time for chronic offenders or special problem cases.

Supporting Argument

The bill would provide greater oversight and set higher and consistent standards for soil erosion and sedimentation control programs by requiring the DEQ to review and approve all soil erosion programs. The bill also would extend the authority to enforce soil erosion laws to certain general law townships while continuing to offer other localities the flexibility to balance the responsibility of water quality improvement and the development of erosion control programs specifically tailored to address local conditions and needs.

Response: Lack of funding to local agencies impedes effective enforcement of erosion and sedimentation control programs.

Supporting Argument

Under the bill, when a county or municipal enforcing agency determined that erosion or sedimentation was occurring or would occur, the agency no longer would be required to inform the landowner of specific control measures that would bring the landowner into compliance. Instead, the agency would have to describe what would have to be done to remedy the violation. The landowner, and not the enforcing agency, then would be responsible for determining

the specific control measures that would be used to bring the site into compliance.

Opposing Argument

Rather than continuing to allow cities, villages, and charter townships to establish soil erosion programs, and extending that authority to general law townships, the bill should limit the authority to counties only. There already are widespread discrepancies among various local enforcement agencies regarding the administration, enforcement, and management standards of acceptable soil erosion programs. Currently, builders and developers working in areas of a county that are under regulation by different local ordinances are subject to a myriad of different definitions, standards, and requirements that can be confusing, time-consuming, and costly. Different degrees of standards and enforcement throughout a county only serve to undermine the efforts to protect State waters from pollution, and are more burdensome to the regulated communities that must do business while operating under multiple sets of standards.

Response: Review by the DEQ of all programs could serve to standardize local regulations.

Opposing Argument

The bill would require the DEQ to review and approve all soil erosion and sedimentation control programs, certify individuals who completed training programs, and provide educational material. The DEQ would be understaffed to give these added responsibilities proper attention.

Legislative Analyst: N. Nagata

FISCAL IMPACT

The bill would result in an indeterminate increase in State and local government expenditures and revenues. The bill would give the Department of Environmental Quality enhanced responsibility for reviewing and approving soil erosion and sedimentation control programs, for certifying training, and for providing educational materials. In addition the bill would extend the authority to establish a soil erosion and sedimentation control program to additional units of local government, including general law townships. The Department estimates that the increased responsibilities under the bill, assuming that few new soil erosion and sedimentation control programs would be established, could result in the need for an additional four to six full-time equated positions at an approximate annual cost of between \$300,000 and \$450,000. A portion of the increased costs would be offset by the revenue from training and examination fees allowed under the bill. Local governments would incur an indeterminate increase in costs associated with the training and examination requirements, and associated fees, of the bill. Finally,

the bill would result in an indeterminate increase in revenue to libraries, to local governments, and to the State General Fund from the increase in civil infraction fines authorized by the bill.

Fiscal Analyst: P. Graham

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.