

NPDES PROGRAM FEES

Senate Bill 252 (Substitute H-3) First Analysis (9-30-03)

Sponsor: Sen. Liz Brater
House Committee: Government
Operations
Senate Committee: Natural Resources
and Environmental Affairs

THE APPARENT PROBLEM:

The enacted 2004 fiscal year budget for the Department of Environmental Quality (DEQ) anticipates \$3 million in new wastewater discharge permit fees to support the DEQ's implementation and enforcement of the National Pollutant Discharge Elimination System (NPDES) program. Enabling legislation is required to institute the new fees.

THE CONTENT OF THE BILL:

The bill would amend Part 31 (Water Resources Protection) of the Natural Resources and Environmental Protection Act to, among other provisions, (1) require applicants for a wastewater discharge permit to submit an application fee, (2) require permit holders to remit an annual permit fee, (3) establish permit fees for various categories of facilities, based in part on federal EPA designations, with separate levels for municipal facilities, (4) permit a municipality to pass on a proportionate share of its permit fee to each user of the municipal facility, and (5) establish the "National Pollutant Discharge Elimination System Fund. The bill would take effect October 1, 2003.

Application and Fees:

Within 30 days of receiving an application for a new or increased use, the DEQ would be required to determine whether the application is administratively complete. Within 90 days after receiving an application for reissuance of a permit, the DEQ would be required to determine whether the application is administratively complete. If the DEQ determines that an application is not complete, it would notify the application, in writing, within the applicable time period. If the DEQ does not make a determination within the required time, the application would be considered to be complete.

Until October 1, 2008, an application for a permit authorizing a discharge into surface water, other than a stormwater discharge, would have to be accompanied by an application fee as follows:

- EPA major facility permit: \$500
- EPA minor facility individual permit, CSO permit, wastewater stabilization lagoon individual permit: \$300
- EPA minor facility general permit: \$50

Under the act, when a person applies for an NPDES permit, the DEQ must grant or deny it within 180 days after receipt, unless the applicant and the DEQ agree to extend the time period.

The bill would retain this deadline for new or increased use permits. The bill would require the DEQ to grant or deny a reissuance of a permit by September 30 of the year following submission of an administratively complete application.

If the DEQ fails to make a determination within the required time period, the DEQ would return the application fee to the applicant, the applicant would not be required to submit an application fee, and the applicant would receive a 15 percent discount on the annual permit fee based upon that application.

Permit Fees:

Until October 1, 2008, a person who received a permit to discharge waste (other than a stormwater discharge) would also be subject to an annual permit fee as follows ("MGD" means one million gallons per day):

TYPE OF FACILITY	FEE
EPA Major Facility	
Industrial or Commercial Facility	\$8,700
Municipal, 500+ MGD	\$173,000
Municipal, 50-499 MGD	\$19,000
Municipal, 10-49 MGD	\$12,000
Municipal, 1-9 MGD	\$ 5,500
EPA Minor Facility	
Industrial/Commercial General Permit, low-flow	\$ 150
Industrial/Commercial General Permit, high-flow	\$400
Industrial/Commercial Individual Permit, low-flow	\$1,650
Industrial/Commercial Individual Permit, high-flow	\$3,650
Municipal, 10+ MGD	\$3,775
Municipal, 1-9 MGD	\$3,000
Municipal, less than 1 MGD	\$1,950
Municipal General Permit, high flow	\$600
Municipal General Permit, low-flow	\$400
Municipal CSO Facility	\$6,000
Wastewater Stabilization Lagoon	\$1,525

Facilities that held permits but did not discharge, or discharged only to a municipal wastewater treatment system, would have to pay an annual permit maintenance fee of \$100.

Payment of Fees

If a municipality is required to pay an application fee or an annual permit fee, it would be allowed to pass the costs of the two fees to each user of that municipal facility.

The DEQ would have to send invoices for annual permit fees to all permit holders by December 1 each year. The fees would be based on the status of the facility as of October 1 of that year, and would have to be submitted by January 15 of each year. The DEQ would have to forward the collected fees to the state treasurer for deposit into the proposed NPDES Fund.

In addition, the DEQ would be required to assess a penalty on all annual permit fee payments that are submitted after the due date, in an amount equal to 0.75 percent of the payment due for each month (or portion of a month) the payment remained outstanding.

If a permit holder wished to challenge the permit fee, the owner or operator would have to pay the fee by the required due date and submit the challenge in writing to the DEQ prior to March 1 of the year in which the payment is due. A challenge would have to identify the facility covered by the permit and state the grounds upon which the challenged was based. Within 30 calendar days of receiving the challenge, the DEQ would have to determine the validity of the challenge and provide the permit holder with notification of a revised annual permit fee, and a refund, if appropriate, of a statement of the reason why the annual permit fee was not revised. A further challenge to the annual permit fee would be in the form of a contested case hearing as provided in the Administrative Procedures Act.

The attorney general could bring an action for collection of the annual permit fee.

Civil Action

The act permits the DEQ to request the attorney general to commence a civil action for appropriate relief for a violation of Part 31 or a provision of a permit, order, rule, or stipulation of the department. A civil action could be brought in the circuit court for Ingham County or for the county in which the defendant is located, resides, or is doing businesses. The bill would add that the defendant may request within 21 days, and the court would grant, a change of venue to the circuit court for Ingham County or the county in which the alleged violation occurred, is occurring, or will occur.

NPDES Fund

The bill would create the National Pollutant Discharge Elimination System Fund within the state treasury. The state treasurer could receive money or other assets from any source for deposit into the fund, and would direct investment of the fund. The treasurer would credit to the fund, any interest and earnings from fund investments. In addition, money in the fund at the end of the fiscal year would remain in the fund and would not lapse into the General Fund.

Money in fund would be expended, upon appropriation, for administration of the NPDES program including, but not limited to, the following:

- Water quality standards development and maintenance.

- Permit development and issuance.
- Maintenance of program data.
- Ambient water quality monitoring conducted to determine permit conditions and evaluate the effectiveness of permit requirements.
- Activities to determine a discharger's permit compliance status, including inspections, discharge monitoring, and review of submittals.
- Laboratory services.
- Enforcement.
- Program administration activities.

Report

The bill would require the DEQ, beginning in 2006, to report by January 1 of each year to the governor and legislature (including the appropriate subcommittee and standing committee chairs), on the department's activities during the previous fiscal year that were funded by the NPDES Fund. The report would include information on staffing, permit applications, permits issued, and the amount of money in the fund at the close of the fiscal year.

Enacting Provisions

The bill would repeal Section 3111 of the act. That section requires a person doing business within the state who discharges wastewaters to the waters of the state or to a sewer system to annually file a report (the "Wastewater Report"). [As defined in rules, a "person" excludes a municipal corporation, a government unit or agency thereof, automotive service stations, laundromats, and car washes.] The Wastewater Report includes an estimate of the amount and type of wastewater discharges, an estimate of the amount of each "critical material" used in and incidental to the manufacturing processes for those critical materials that exceed the annual use threshold, an estimate of the amount of each critical material discharged, and an estimate of the amount of each critical material disposed of as waste product or by-product and transferred off-site for those critical materials that exceed the annual usage threshold.

HOUSE COMMITTEE ACTION:

The House Committee on Government Operations made the following changes:

First, the committee added language requiring the DEQ to determine within 30 days or 90 days, depending on whether the permit was a new or increased use or simply a reissuance, whether the application for a permit is administratively complete. Second, the committee added language regarding a change of venue for a civil action brought by the attorney general on behalf of the DEQ. Third, the committee lowered the application fees, which had been set as follows:

- EPA major facility: \$1,000
- EPA minor facility, individual permit: \$500
- EPA minor facility, general permit: \$100
- Major modification of an existing permit: \$500

Fourth, the committee lowered most of the permit fees, which had been set as follows:

TYPE OF FACILITY	FEE
EPA Major Facility	\$9,822
Municipal, 500+ MGD	\$66,918
Municipal, 50-499 MGD	\$20,596
Municipal, 10-49 MGD	\$13,044
Municipal, 1-9 MGD	\$5,608
EPA Minor Facility	
General Permit, low-flow	\$559
General Permit, high-flow	\$838
Individual Permit, low-flow	\$2,101
Individual Permit, high-flow	\$4,380
Municipal, 10+ MGD	\$3,775
Municipal, 1-9 MGD	\$2,875
Municipal, less than 1 MGD	\$1,970
Municipal General Permit, high-flow	\$716
Municipal General Permit, low-flow	\$476
Municipal CSO Facility	\$6,504
Wastewater Stabilization Lagoon	\$1,583

Finally, the committee added the provision that repeals Section 3111.

BACKGROUND INFORMATION:

Since 1973, the federal Clean Water Act has required that all facilities discharging pollutants from a direct point source into the waters of the United States obtain a permit under the National Pollutant Discharge Elimination System (NPDES) program. The majority of facilities with point-source

discharges are industrial and commercial facilities, and municipal treatment facilities that receive domestic sewage from residential and commercial customers. An NPDES permit establishes how much pollution may be discharged based on wastewater flow, the quality of the water into which pollutants are discharged, the potential impact of the discharge on public health, and the proximity of the discharge to nearby coastal waters.

The U.S. Environmental Protection Agency (EPA) oversees the NPDES program, but authorizes the states to administer it. The DEQ, the state's regulatory agency for the program, issues three types of NPDES permits. A customized individual permit contains pollution limits and conditions applicable to a single facility or site. A general permit contains pollution limits and conditions that apply to a broad range of facilities or site. Many individual facilities may apply for a certificate of coverage under a single general permit. Finally, the DEQ may issue a permit-by-rule, in which case facilities follow conditions listed in state administrative rules.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill as reported from committee would produce a shortfall of \$100,000 to \$120,000 from the approximately \$3 million that would have been raised by the Senate-passed version of the bill. This shortfall is attributable to the provision that allows facilities that held permits to discharge waste but that did not discharge to pay only an annual permit maintenance fee of \$100 rather than a full permit fee. (Information from HFA on 9-30-03)

ARGUMENTS:

For:

The 2004 fiscal year budget of the Department of Environmental Quality relies on the revenue generated by the application and permit fees. If the bill is not enacted, funding for the program would likely come from General Fund, which is already under great pressure with a projected shortfall for the 2003-2004 fiscal year. Another possible consequence of the absence of funding would be the administration of the state's NPDES program by the federal Environmental Protection Agency. However, it has been noted that neither permit holders nor environmental groups would be excited by such a proposition because the nearest EPA personnel are located in Chicago, which makes compliance and enforcement quite difficult. Further, the EPA, at

present, does not have the resources necessary to enforce the program, thereby effectively suspending the program for a period of a few years until the infrastructure could be put in place.

For:

Aside from the immediate needs to support the DEQ budget, the bill finally institutes a fee for NPDES permits. Currently, 33 other states, including all of the other Great Lakes states, charge a permit fee. Funding the NPDES program with the support of permit fees pushes the direct costs from taxpayers to those responsible for discharging wastewater into the state's surface waters. Further, by instituting the new fees, the state demonstrates its commitment to supporting the NPDES program and, more importantly, its vital water resources.

Response:

While the institution of new fees is good, the amount of revenue generated by them is woefully inadequate, particularly when compared to nearby states. Revenue generated from NPDES permits in Ohio and Indiana total about \$5.5 million in each state. Further, the recently enacted 2004 fiscal year budget for Illinois included NPDES permit fees for the first time, with revenue estimated to be approximately \$26 million per year. Based on that, steps should be taken to further increase the fee amounts in subsequent years (beyond FY 2004) so as to fully fund the program from fees. This would finally eliminate the taxpayer subsidy that polluters receive.

Against:

The inclusion of new fees on businesses further erodes the state's competitiveness with other states when seeking to attract and retain businesses. Further, it is believed by some that businesses already support the program through their payment of the Single Business Tax. With all of the recent discussion on ways to resuscitate the state's declining manufacturing industry, saddling these businesses with new fees seems counterintuitive.

Further, the imposition of fees places a tremendous burden on some permit holders, especially those who discharge very little actual pollutants, particularly agricultural permit holders.

For:

The wastewater report is duplicative and burdensome to manufacturers, and it is not entirely clear as to what extent the DEQ uses the information contained in the report. The stated mission and goals of the annual wastewater report (AWR) program include the following: (1) taking the lead role in providing

education, information and assistance, and the dissemination of pertinent information on the reporting requirements under the AWR program; (2) maintaining all reporting-related documents, brochures, and forms associated with the AWR program; (3) receiving and processing reports submitted under the AWR program; (4) operating and maintaining the necessary database for the AWR program data; (5) operating and maintaining the DEQ's Environmental Science and Services Division web site; (6) tracking reporting under the AWR and issuing advisory letters to entities that fail to file timely reports; and (7) preparing periodic evaluations and summary reports of data collected under the AWR program for use by the DEQ in carrying out its water control programs.

Based on these stated goals, it appears that the wastewater report is filed with no real reason other than to file a report. None of the stated goals speak to an environmental reason as to why the report is filed and to what purpose it is put. It appears, then, the manufacturers file a report simply to file a report.

In addition, it should be noted that the annual wastewater report was not required to be filed during much of the 1990's, and that the list of critical materials was extremely pared down in recent years, both of which suggest that the usefulness of the report is rather suspect.

Further, the information contained in the report is already available in a variety of other materials reported to the DEQ, including the Toxic Chemical Release Inventory (TRI) and the Material Safety Data Sheets (MSDS), both of which are used by local fire units and emergency response teams when responding to a crisis.

Response:

The wastewater report is highly useful to the DEQ, local governments, and interested citizens in finding out the type and quantity of dangerous materials stored by businesses. The report includes a list of "critical materials" that are used and incidental to the manufacturing process. Examples of these critical materials include lead, mercury, and arsenic, among other known carcinogens. Eliminating the wastewater report severely hinders the public's (including employees') right to know what chemicals are being used, stored, and discharged by the state's manufacturers. More importantly, hazard materials teams and fire units use this report when responding to a call at or near a manufacturing facility. Without such information, first responders can unwittingly make a bad situation worse or put themselves in danger, simply because they do not fully know or

understand the chemicals used in a manufacturing plant. In addition, the report is used to develop adequate NPDES permits, water quality standards, response to spills and chemical releases, industrial pre-treatment programs, and pollution prevention activities. Further, if manufacturers are not required to file the wastewater report, there is the increased potential of noncompliance with the NPDES program and greater risk of harm to the environment and public health. Finally, the wastewater report differs from the TRI and other reports in that the wastewater report includes materials that are stored at facilities, not just those that are discharged, and the wastewater report includes some materials that are not covered by the TRI.

For:

The bill attempts to streamline the application and permitting process by placing time requirements on the DEQ within which it must act. First, the bill would add a requirement that the DEQ make a determination that an application is administratively complete within a limited period of time, and that if a determination is not made within the required time, the application is automatically considered to be complete. (This review of completeness simply checks to see if all of the requisite information is provided. No further action is taken on any incomplete application until the necessary information is supplied.) Now, no such time requirement exists, which means that the DEQ can delay the application process. This has the potential to be particularly burdensome to new businesses that need to obtain a permit in order to operate.

In addition, the bill would impose on the DEQ a penalty equal to 15 percent of the permit fee if it fails to act on a permit application within the required time. This penalty should provide sufficient inducements for the DEQ to process the permit applications in a timely manner.

These changes are necessary due to the new fees imposed on applicants and the general state of the manufacturing industry in Michigan. If permit holders are expected to pay an application fee, the DEQ should take action on that application in a timely manner. Further, given that there is no application fee now, the new revenue provided by the fee should provide with DEQ with sufficient resources so as to avoid a backlog of applications. Secondly, improved timeliness in the permitting process invariably improves the state's competitiveness in attracting new manufacturing facilities (and it does so without sacrificing tax revenue), as a backlog of permit applications and the prospect of waiting for a permit surely dissuades a

manufacturer from deciding to place a new plant in the state.

Response:

The new time requirements are particularly troublesome to the DEQ. Given recent cutback in staff levels due to the “early out” programs (and likely cutbacks in general fund dollars) there is a potential for the increased workload and reduced resources to result in a backlog. While the DEQ makes every attempt to process the applications in a timely manner, a 15 percent penalty further erodes the ability of the DEQ to prevent a backlog. If anything, a better means to achieving improved timeliness in the permitting process would be an increase in support from fees and the general fund. Increased resources - particularly those raised through fee revenue - would serve as a better incentive to increased timeliness than the punitive approach taken by the bill.

POSITIONS:

The Department of Environmental Quality has no position on the bill as written. (9-29-03)

The Michigan Chamber of Commerce supports the bill. (9-29-03)

The Michigan Environmental Council opposes the bill in its current form, but would be supportive of the bill if the repeal of the wastewater report was removed. (9-29-03)

The National Federation of Independent Business opposes the fees in general but is supportive of the lower fees in the House substitute compared to the Senate-passed version of the bill. (9-29-03)

The Michigan Farm Bureau opposes the new fees added by the bill. (9-29-03)

Clean Water Action opposes the bill, particularly the elimination of the wastewater report and the stringent timeframes placed on the DEQ to process applications and permits. (9-29-03)

The Sierra Club - Mackinac Chapter opposes the bill with the elimination of the wastewater report and the timeframes imposed on the DEQ (9-29-03)

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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.