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STORMWATER DISCHARGE PERMIT FEES

Senate Bill 510 (Substitute H-2)
First Analysis (10-1-03)

Sponsor: Sen. Burton Leland
House Committee: Government Operations
Senate Committee: Appropriations

THE APPARENT PROBLEM:

In 1972, the Federal Water Pollution Control Act (commonly known as the Clean Water Act) was substantially amended to prohibit the discharge of any pollutant to waters of the United States without first obtaining a National Pollutant Discharge Elimination System (NPDES) permit. In 1987, the CWA was again amended to require the U.S. Environmental Protection Agency to establish NPDES requirements for the discharge of storm water from industrial facilities (including certain construction sites) and certain municipalities.

Following the 1987 CWA amendments, the EPA promulgated rules in 1990 implementing the first phase of the permitting system. Under Phase I, permits were required for (1) industrial facilities, (2) construction sites disturbing five or more acres, and (3) municipal separate storm sewer systems (MS4s) in municipalities with a population of 100,000 or more.

Phase II of the program further expanded the type of sites and facilities required to obtain a NPDES storm water discharge permit. Under Phase II, permits were also required for small construction sites between one and five acres, and municipalities in an "urbanized area" (that is, generally, a local government or group of local governments that have a combined population of greater than 50,000 and a population density of more than 1,000 people per square mile).

Phase II of the storm water program officially took effect on March 10, 2003. The enacted 2004 Fiscal Year budget for the Department of Environmental Quality anticipates an increase in funding for the expanded program through an increase in storm water discharge permit fees. Enabling legislation is required.

THE CONTENT OF THE BILL:

The bill would amend Part 31 of the Natural Resources and Environmental Protection Act to increase the fees paid by dischargers of storm water. The bill would create different fees for municipal separate storm sewer systems based on the population served.

Currently, the storm water discharge fees are set to expire on October 1, 2003. Construction sites pay a one-time fee of $125. The annual fee for all other dischargers, including industrial facilities and MS4s, is $200.

The bill would increase the fees for storm water discharge permits for all types of facilities. The bill would set the one-time permit fee for construction sites at $400, an increase of $275 from the current fee of $125. The fee would be paid only by construction sites that disturb five acres or more. Construction sites between one and five acres would be covered by a permit-by-rule and would not be required to file a Notice of Coverage or an application fee. They would, however, have to comply with the storm water discharge regulations.

Industrial and commercial sites would pay an annual permit fee of $260, an increase of $60 from the current fee of $200. Selected municipal facilities, such as power plants, airports, and bus or truck garages, would be subject to the fee for industrial facilities. The permit fee for municipalities would be based on the population served by the storm system. If the population served by an MS4 were different from the latest decennial census, the permit holder could appeal the annual fee determination and submit written verification of the actual population served by the system. The table below shows the proposed fee for each size of municipality.

Population Range	Proposed Annual Fee
0 -- 1,000	$ 500
1,001-- 3,000	$1,000
3,001--10,000	$2,000
10,001--30,000	$3,000
30,001--50,000	$4,000
50,001--75,000	$5,000
5,001 -- 100,000	$6,000
100,000 +	$7,000
MS4 institutions	$ 500
Counties	$3,000

An annual fee of $500 would be required for a permit for a municipal separate storm sewer system that is not issued to a city, village, township, or county, or is not a single permit authorization for municipal separate storm sewer systems in multiple locations. The annual fee for a single municipal separate storm sewer systems permit that authorizes a state or federal agency to operate municipal separate storm systems in multiple locations statewide would be determined in accordance with a memorandum of understanding between that state or federal agency and the DEQ, and would also be based on the projected needs by the DEQ to administer the permit.

A person possessing a permit not related solely to a site of construction activity as of January 1 would be assessed a fee. The DEQ would notify those individuals of the fee assessment by February 1. Payment of the fee would have to be post marked by March 15. The failure of the DEQ to send a notice of the fee assessment or a failure of the individual to receive a fee assessment notification would not relieve that individual of his or her obligation to pay the fee. If the department does not meet the February deadline for sending the notice, fee assessment would be due not later than 45 days after receiving the notification. If a person fails to pay the fee by the required date, the DEQ could undertake any enforcement action under Part 31, and the person would be subject to any other penalty as provided under Part 31. In addition, the attorney general could bring an action to collect overdue fees and interest payments. Appeals of a fee or penalty would have to be filed with circuit court within 30 days of the DEQ's fee notification and would be limited to an administrative appeal in accordance with the Revised Judicature Act.

The storm water fund currently receives all storm water discharge permit fee revenue and interest. Money in the fund can be used for a variety of storm water related activities, such as the review of permits and enforcement activities. The bill would add to the list of allowable activities, regional or statewide public education to enhance the effectiveness of stormwater permits.

In addition, the bill would require the DEQ to file a report with the governor and the legislature, including the appropriate standing committees and appropriations subcommittees. The report would include information on the staffing, permit applications, and the amount of money in the storm water fund.

The bill would take effect on October 1, 2003, and have a sunset date of October 1, 2008.

HOUSE COMMITTEE ACTION:

The House Committee on Government Operations adopted a substitute H-2 for SB 510. The substitute made the following changes to the Senate-passed version of SB 510:

- Deleted language that permitted the DEQ to suspend or revoke a permit if a payment was not made on time. This provision also provided that if a permit were revoked, a person would not be allowed to apply for a new permit before three years from the effective date of the revocation, and, at the time of application, the person would be required to pay a fee of $500 in addition to the annual assessment.

- Added language permitting the attorney general to bring an action to collect overdue fees and interest payments.

- Extended the sunset from October 1, 2007 to October 1, 2008.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the fee increases contained in the bill would support staff and programmatic increases necessary to maintain certification under Phase II of the National Pollutant Discharge Elimination System (NPDES). The base program would be increased by five positions and $1,162,500, thereby funding the NPDES program at 19.5 positions and $2,526,500. These increases are included in the enacted DEQ appropriation bill. (HFA analysis on an earlier, though substantially similar version of the bill dated 9-16-03)

ARGUMENTS:

For:

The bill is necessary to support the continued and expanded efforts of the Department of Environmental Quality as they related to the implementation and enforcement of storm water discharge permits required under the federal Clean Water Act. Similar to the arguments presented in support of Senate Bill 252, which also pertains to NPDES permits, if the additional fees are not approved, the DEQ would not be able to financially absorb these costs, and the U.S. Environmental Protection Agency would have to assume responsibility for the program. However, as noted before, regulated industries and environmental groups are not terribly excited by such a proposition as the nearest EPA personnel are located in Chicago and the agency does not, at present, have the capacity to take over the state's responsibilities for such a program.

Response:

While not actually arguing against the bill, municipal organizations have expressed concern about the ability of local governments to pass on the increased cost of the fees to consumers. Indeed, Senate Bill 252 specified that the increased NPDES permit fees contained in the bill could be passed on. This concern is a result of the Michigan Supreme Court's 1998 opinion in *Bolt v. City of Lansing (459 Mich 152).* At issue in *Bolt* was a Lansing city ordinance that imposed a storm water service charge on each parcel of real property located in the city, based on an approximation of each parcel's storm water runoff. The charge was imposed as a means to separate the city's remaining combined sanitary and storm sewers.

The court determined that Lansing's storm water service charge was actually a tax and not a fee, because, "to conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as 'services' and enacting a myriad of 'fees' to support those services." In particular the court noted the service charge failed to meet certain characteristics of actual fees: (1) user fees serve a regulatory purpose, and not a revenue-raising purpose, and (2) user fees are proportionate to the necessary costs of the service. Also, the stated goals of the ordinance were the improved water quality of the Grand and Red Cedar Rivers and the avoidance of federal penalties imposed for discharge violations. These stated goals are public benefits more associated with taxes than individual/user benefits associated with fees.

The finding that Lansing's storm water service charge was a tax forced application of the Headlee amendment to the state constitution (Article 9, Section 31). That provision provides that a local unit of government cannot levy taxes not authorized by law or charter when the amendment was enacted or increase the rate of an existing tax above the rate authorized by law or charter when the amendment was enacted without the consent of a majority of the electorate of that local unit of government.

The apparently broad language in the court's opinion has prompted some concern among municipalities that the opinion could invalidate other more common types of charges. Based on these concerns, specific language should be added to the bill so as to permit municipalities to pass on the costs. For instance, the bulk of most county responsibilities under Phase II of the storm water program are a result of the county drain commissioner. Enabling counties to pass on the costs of the increased fees would allow them to pass those costs on to, in most instances, the various drainage districts.

POSITIONS:

The Michigan Association of Counties, the Michigan Townships Association, and the Michigan Municipal League each testified that they are supportive of the fee increases (understanding their necessity), although they are concerned about their ability to pass on those increased storm water permit fees, given the Michigan Supreme Court's opinion in *Bolt v. City of Lansing.* (9-30-03)

The Michigan Environmental Council indicated support for the bill. (9-30-03)

The Michigan Manufacturing Association indicated support for the bill. (9-30-03)

The Michigan Association of Home Builders indicated support for the bill. (9-30-03)

Analyst: M. Wolf

■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.