Legislative Analysis

Mitchell Bean, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

AQUATIC NUISANCE CONTROL

House Bill 4729 as enrolled
Public Act 247 of 2004
Sponsor: Rep. John Gleason

House Bill 4730 as enrolled
Public Act 246 of 2004
Sponsor: Rep. John Stakoe
House Committee: Great Lakes and Tourism
Senate Committee: Natural Resources and Environmental Affairs

First Analysis (4-4-05)

BRIEF SUMMARY: House Bill 4730 added a new Part 33 to the National Resources and Environmental Protection Act, known as the NREPA, to regulate the control of aquatic nuisance species. The new Part 33 would be entitled "Aquatic Nuisance Control."

House Bill 4729 amended the Natural Resources and Environmental Protection Act to establish penalties for violations of the new Part 33.

FISCAL IMPACT: While there are financial effects on both state and local governments, they are expected to be minimal. (See additional information under Fiscal Information.)

THE APPARENT PROBLEM:

Whenever a person applies a pesticide to a body of water in the State of Michigan, a permit is needed from the Department of Environmental Quality. Two kinds of permits are issued for small bodies of water with surface areas of less than 10 acres: 1) if the body of water has no outlet (often but not always a man-made pond or lake) and also has no record of endangered species with the Department of Natural Resources, then a permit "by rule" is issued by the DEQ; 2) however, when the body of water has an outlet and is part of a watershed or system, a general permit is issued by the department. During 2003, the department issued 1,630 permits.

Permits allowing water to be treated with a poisonous pesticide are issued annually, so applicants must renew them each year. Customarily, applicants apply early in the calendar year—with applications peaking in March—in order to have their permits in place by May 1 near the beginning of the warm season when water sports are again possible. Generally, the applicants seek to treat the water to eradicate or control unwanted aquatic plants or algae, or to kill the snails that carry the parasite that causes the condition known as swimmers' itch.

A significant backlog of pesticide treatment applications developed at the DEQ before 2003 because the more than 1,600 permits had to be processed by three employees.

According to committee testimony, many applications for pesticide treatment were not reviewed, and bodies of water went untreated. Or, as some testified, 'vigilantes' took matters into their own hands, applying pesticides to the water without the permission of the department.

During 2004, the fees for the permitting system were increased by the legislature and governor. (See Background Information below.) With the additional revenue, the department has hired three new employees, bringing the total number of permit-processors to six.

To ensure that the backlog does not occur again, legislation has been introduced that would expedite the permitting process.

THE CONTENT OF THE BILLS:

The bills amended the Natural Resources and Environmental Protect Act to revise the provisions governing aquatic nuisance plants. The bills were tie-barred to each other so that neither could become law unless both were enacted. They took effect on October 1, 2004.

House Bill 4730 added Part 33—Aquatic Nuisance Control—to the Natural Resources and Environmental Protection Act (MCL 324.30113 et al) to do the following:

• Require that a person obtain a permit or certificate of coverage from the Department of Environmental Quality (DEQ) for the chemical treatment of some state waters and bottomlands of the Great Lakes and Lake St. Clair for the purposes of controlling aquatic nuisance species.

• Allow the chemical treatment of other state waters without a permit, for the purposes of aquatic nuisance control, if the body of water meets certain conditions.

• Allow a permit applicant to provide scientific documentation to support a proposed pesticide, application rate, or means of application for a whole lake treatment, including the use of fluridone at rates exceeding 6 parts per billion.

• Prescribe annual permit application fees.

• Require the DEQ to pay an applicant 15 percent of the application fee if the department fails to issue a permit by May 1 or within 30 working days after receiving a complete application, whichever was later.

• Authorize the DEQ to impose various permit conditions.

The bill also would repeal sections of the Public Health Code that presently require a permit from the DEQ for the application of chemicals to water for the control of aquatic nuisances.

A more detailed description of the bill follows.

House Bill 4730, generally speaking, would prohibit a person from chemically treating any waters of the state and the Great Lakes or Lake St. Clair for purposes of aquatic nuisance control without an individual permit or certificate of coverage from the DEQ. However, a person could chemically treat waters without obtaining a permit or a certificate if all of the following criteria are met: the water-body does not have an outlet; there is no record of species on a list of endangered or threatened species; the water-body has a surface area of less than 10 acres; written permission for the proposed chemical treatment is obtained from each owner (if the bottomlands of the water-body are owned by more than one person) ; and the person posts the area of impact.

A person who conducts a chemical treatment under this exception must maintain all written permissions and records of treatment, including treatment date, chemicals applied, amounts applied, and a map indicating the area of impact, for one year from the date of each treatment. The records must be available to the department, upon request.

Under the bill, a person cannot apply for a permit of certificate of coverage, or conduct a chemical treatment, unless he or she is one or more of the following: an owner of bottomland within the proposed areas of impact; a lake board established under the act; a state or local governmental entity; or a person with written authorization to act on behalf of any of the previous persons or entities.

If a whole lake treatment is proposed, an applicant must provide a lake management plan. An applicant for a permit for a whole lake evaluation treatment may provide scientific evidence and documentation that the use of a specific pesticide, application rate, or means of application will selectively control an aquatic nuisance but not cause unacceptable impacts on native aquatic vegetation, other aquatic or terrestrial life, or human health. Such evaluation treatments include the use of fluridone at rates in excess of six parts per billion. The department may place special conditions in a permit to require additional ambient monitoring to document possible adverse impacts on native aquatic vegetation or other aquatic life. If the department denies the application, department officials must provide the applicant the scientific rationale for the denial, in writing.

Under the bill, a chemical cannot be used for aquatic nuisance control, unless it has been registered with EPA and the Department of Agriculture, in compliance with state and federal laws. The DEQ can conduct evaluations of the impacts and effectiveness of any chemicals that are proposed for use, including the issuance of permits for field assessments.

The director of the DEQ, in consultation with the director of the Department of Agriculture, can issue an order to prohibit or suspend the use of a chemical for aquatic nuisance control, if, based on substantial scientific evidence, use of the chemical causes unacceptable negative impacts to human health or the environment. The DEQ cannot

issue permits for such chemicals, and a person using such chemicals must cease upon notification by the state.

Until October 1, 2008, an application for a certificate of coverage must be accompanied by a $75 fee and an application for an individual permit must be accompanied by a fee, based on the size of the area of impact, as follows:

Less than one-half acre	$75
One-half acre or more but less than 5 acres	$200
Five acres or more but less than 20 acres	$400
Twenty acres or more but less than 100 acres	$800
One hundred acres or more	$1,500

These are the same as the fees put in place by Public Act 164 of 2003. The section amended by Public Act 164 is repealed and replaced by House Bill 4730. Fees collected are deposited in the Land and Water Management Permit Fee Fund.

An applicant must obtain authorization to chemically treat an area by obtaining written permission from each person who owns bottomlands in the area of impact. Written permission is not required if the applicant is providing, or has contracted to provide, chemical treatment for a lake board, or for the state, or a local government acting to conduct lake improvement projects or to control aquatic vegetation.

A permit to apply chemicals to a body of water must include, at a minimum, all of the following information: a) the active ingredient or the trade name of each chemical to be applied; b) the application rate of each chemical; c) the maximum amount of each chemical to be applied per treatment; d) the minimum length of time between treatments for each chemical; and e) a map or maps that clearly delineate the approved areas of impact.

The department could require a number of conditions on the permit, including two working days' notice of chemical treatment; the presence of a department representative during treatment; the collection of samples of chemicals before and after treatment; the posting of signs in the area of impact before treatment; notices in local newspapers and announcements on local radio stations about the treatment; written notices to nearby waterfront property owners; treatment reports for each treatment session; lake water residue analysis to verify chemical concentrations; aquatic vegetation surveys; chemical control methods consistent with water management plans; and pretreatment monitoring of the target aquatic nuisance population. The department could also make minor revisions to a permit under certain conditions at the request of the permittee.

House Bill 4729 would amend Part 33 of the Natural Resources and Environmental Protection Act (MCL 324.3313) to provide that a person who violated Part 33 is guilty of a misdemeanor. As shown below, the penalties depend on whether a violation results in harm to or posed a substantial threat to natural resources, the environment, or human health; whether it is committed by a corporate officer with advance knowledge of the

violation and failed to prevent it; whether the violation results in serious harm or poses a substantial and imminent threat and the violator knows or should have known that it could have that result; and whether the violator makes a false statement in a permit application or report.

Violation	Maximum Imprisonment	Minimum Fine	Maximum Fine
No harm or threat	NA	NA	$500
Harm or threat, or corporate violator	6 months	$1,000	$2,500
Repeat offense	1 year	$2,500	$5,000
Serious harm or imminent and substantial threat; with knowledge	1 year	$5,000	$10,000
Repeat offense	2 years	$7,000	$15,000
False statement	NA	$1,000	$2,500
Repeat offense	1 year	$2,000	$5,000

The attorney general could commence a civil action for appropriate relief, including an injunction restraining a violation or ordering restoration of natural resources affected and a civil fine of up to $25,000. Also the department could revoke a permit or certificate for a knowing violation.

FISCAL INFORMATION:

Fees and Administration. The fees in House Bill 4730 were already set in statute at the same rates with the same sunset date. The bill would require the Department of Environmental Quality to grant or deny an application for a certificate of coverage before May 1 or within 15 days, whichever is later, and an application for a permit before May 1 or within 30 working days of receipt of a completed application, whichever is later. Since the chemicals are applied primarily during the summer months, almost all of the permit applications are submitted in the spring. The deadline proposed in the bill is currently being met by the DEQ for these applications. Since the DEQ currently is meeting this deadline for application review, the provision requiring the department to pay the applicant 15 percent of the application fee if the deadline is not met would not have a large effect. Loss of revenue from this proposal would be minimal.

Violations. The bills would have an indeterminate fiscal impact on state and local government. There is no information on the number of convictions of similar existing sections of the Public Health Code that House Bill 4730 would repeal and replace, nor are there estimates of the number of convictions likely for violations of the proposed new misdemeanors. Local governments bear the costs of misdemeanor probation and incarceration, which vary by county. Public libraries receive fine revenue.

ARGUMENTS:

For:

Many private sector managers of aquatic nuisances have reported they must wait too long for their applications to be processed by the Department of Environmental Quality each spring. Indeed, during the 2003 calendar year, many applicants reported that their applications were *never* reviewed, despite the fact that they had paid their application fees. Regardless of the reasons for their inability to review the aquatic nuisance permit applications, the department has lost credibility in the field. This legislation would require the department to pay 15 percent of the applicant's fee if the applicant's permit application were not processed within 30 working days or before May 1.

Response:

The bills are not needed at this time. During 2003, the number of applicants seeking review jumped to 1,630—and only three employees at the Department of Environment Quality were available to do the work. However, improvements were made to the aquatic nuisance control program in 2004 following the increase in fees adopted by the legislature in order to fund the program—a result of Public Act 164 of 2003, which went into effect on August 11, 2003. With the increase in revenue, the department has been able to hire three additional analysts, which doubles the staffing dedicated to the program, bringing the total to six. Consequently, opponents of the bills argue that the department should be allowed to do its job, now that the program is adequately funded and fully operational.

For:

Supporters say that permit applicants should be allowed to provide scientific documentation to support a proposed pesticide, application rate, or means of application for a whole lake treatment, including the use of fluridone at rates exceeding six parts per billion.

According to testimony from an aquatic ecologist who works for Aquest Corporation based in Flint, Michigan, the Department of Environmental Quality has set dose rates of one aquatic herbicide so low that some pest populations have developed a tolerance, and the herbicide is growing ineffective with those species. The department has set the dose conservatively in an effort to moderate the strength of the herbicide fluridone—one of the most effective poisons for the control of the invasive (and exotic) species known as Eurasian watermilfoil and curly leaf pondweed—to ensure that bio-diversity and native species continue to survive. However, the department may have set the allowable doses of fluridone too low. According to the aquatic ecologist, recent research clearly indicates that fluridone applied at 6 PPB (parts per billion) can lead to the development of tolerance in Hydrilla populations (Koschnick and Haller, 2003). Consequently, the permitted doses could represent a greater threat to lakes than do high doses, promoting tolerances to develop among some species in much that same way that human beings develop tolerances to antibiotics when they are used inappropriately.

Against:

Critics oppose allowing permit applicants to provide scientific documentation to support the use of fluridone at rates exceeding six parts per billion (and similar permit requests). Specific requirements for fluridone use that adequately protects native aquatic vegetation have been set by the U.S. Environmental Protection Agency, but Michigan's standards are more stringent. The maximum allowable label rate for fluridone, determined by the EPA, is 150 parts per billion (ppb), although the current administrative rules restrict the use of fluridone to a minimum concentration of 6 ppb. This use criterion is based on many years of research to determine a method of selected control for a specific target aquatic plant called Eurasian watermilfoil. Fluridone used at higher concentration results in nonselective removal of native aquatic vegetation, and could result in complete devastation of a lake's aquatic plant community.

Against:

The Michigan Environmental Council points out that while many people say there are too many plants growing in our lakes, the approach proposed in these bills is backward, because no one has asked the right question—Why are too many plants growing in a particular lake? The MEC notes that in many locations, the problems are related to failed septic systems resulting in untreated sewage flowing into the lakes. In other areas, the over-application of lawn fertilizers results in nutrient overloads leading to more aquatic plants. And in some cases, non-native species are crowding out native species. The state should not change the law in ways that make it easier to use aquatic pesticides without first addressing the underlying cause of the problem.

Legislative Analyst: J. Hunault

■ 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.