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Senate Bill 252 (Substitute S-7 as passed by the Senate)
Sponsor: Senator Liz Brater
Committee: Natural Resources and Environmental Affairs

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RATIONALE

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. A "direct point source" is a pipe or manmade ditch that deposits waste directly into a body of water. The majority of facilities with point-source discharges are industrial and commercial facilities, and municipal treatment works that receive domestic sewage from residential and commercial customers. An NPDES permit establishes how much pollution may be discharged based on wastewater flow, the amount of conventional and toxic pollutants in the discharge, 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 United States Environmental Protection Agency (EPA) oversees the NPDES program, but authorizes states to administer it. Michigan's Department of Environmental Quality (DEQ), the State's regulatory body for the program, issues three types of NPDES permits. The first, a customized *individual permit*, contains pollution limits and conditions applicable to a single facility or site. The second type, a *general permit*, contains pollution limits and conditions that apply to a broad range of facilities or sites. 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. As long as a facility follows these rules, it is considered to have a permit.

Most states charge permit holders fees to pay for all or part of the regulatory process. Since the late 1970s, Michigan has not charged permittees, but paid for permit issuance, compliance, and monitoring out of the General Fund. According to the DEQ, the program costs \$3 million per year to issue licenses, and another \$2 million for monitoring and compliance. Some people believe that charging a fee for the NPDES permits would provide essential fiscal relief for the State, and others suggest that charging a fee based on the amount of pollutants and potential harm to the environment would encourage facilities to discharge fewer pollutants.

CONTENT

The bill would amend Part 31 (Water Resources Protection) of the National Resources and Environmental Protection Act to do the following:

- **Require that applicants for a wastewater discharge permit submit an application fee until October 1, 2007.**
- **Until October 1, 2007, require wastewater discharge permit holders to pay an annual permit fee.**
- **Establish the permit fees for various categories of facilities, based in part on EPA designations, with separate levels for municipal facilities.**
- **Permit a municipality to pass on a proportionate share of its permit fee to each user of the municipal facility.**
- **Allow a facility to challenge its annual permit fee.**
- **Require a permit application to include the pollution prevention efforts the applicant had evaluated and undertaken.**

- **Require the DEQ to assess a late fee on all permit fees paid after the due date.**
- **Establish the "National Pollutant Discharge Elimination System Fund", which the DEQ would use to administer the NPDES program.**
- **Require the DEQ, by each January 1 beginning in 2006, to report to the Legislature and the Governor on the departmental activities of the previous fiscal year funded by the Fund.**
- **Require the DEQ, beginning two years after the bill's effective date, to compile information obtained from permit applications and post it on the Department website.**

The bill would take effect October 1, 2003.

Application Fees

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

The bill would define "EPA major facility" as a facility designated by the EPA as being a major facility under 40 C.F.R. 122.2. (That Federal rule establishes two separate designations for municipal and industrial facilities. If owned by a municipality, a major facility is one that has a water flow of 1 million gallons per day, annually averaged. If an industrial facility, a major facility is one that meets criteria based on flow, toxic pollutant potential, public health impact, and other factors.) The bill would define "EPA minor facility" as a facility that was not an EPA major facility.

A permit would have to be reissued by September 30 of the year following submittal of an administratively complete application.

Permit Fees

A person who received a permit to discharge sewage or other waste disposal into the waters of the State would be subject to an annual permit fee as shown in Table 1. (The

abbreviation "MGD" would mean 1 million gallons per day.)

Table 1: Proposed Wastewater Permit Fees

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
General Permit, high-flow	\$716
General Permit, low-flow	\$476
Municipal CSO Facility	\$6,504
Wastewater Stabilization Lagoon	\$1,583

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.

"Municipal facility" would mean a facility owned or operated by a local unit, authority, or other public body, including an intermunicipal agency of two or more municipalities, authorized or created under State law. "Low-flow facility" would mean a facility that discharged less than 1 MGD. "High-flow facility" would mean a facility that discharged 1 MGD or more.

"General permit" would mean a permit suitable for use at facilities meeting eligibility criteria as specified in the permit. With a general permit, the discharge from a specific facility would be acknowledged through a certificate of coverage issued to the facility. "Individual permit" would mean a permit developed for a particular facility, taking its specific characteristics into account.

The bill would define "CSO facility" as a facility whose discharge was solely a combined sewer overflow. ("Combined sewer overflow" would mean a discharge from a combined sewer system that occurred when the flow capacity of the combined sewer system was exceeded at a point prior to the headworks of a publically owned treatment works during wet weather conditions. "Combined sewer system" would mean a sewer designed and used to convey both storm water runoff and sanitary sewage, and that contained lawfully installed regulators and control devices that allowed for delivery of sanitary flow to treatment during dry weather periods and divert storm water and sanitary sewage to surface waters during storm flow periods.)

"Wastewater stabilization lagoon" would mean a type of treatment system constructed of ponds or basins designed to receive, hold, and treat sanitary wastewater for a predetermined amount of time, through a combination of physical, biological and chemical processes.

Payment of Fees; Challenge

The DEQ would have to send invoices for annual permit fees to all permit holders by December 1 each year. The fees would have to be submitted by January 15 of each year. The DEQ would have to forward fees to the State Treasurer for deposit into the proposed NPDES Fund.

The DEQ would have to assess a penalty on all annual permit fee payments submitted after the due date, in an amount equal to 0.75% of the payment due for each month, or portion of a month, the payment remained past due.

If a permittee wished to challenge its annual permit fee, the owner or operator would have to submit the challenge in writing to the DEQ after paying the fee. The Department could not process the challenge unless the DEQ received it by March 1 of the year the payment was due. A challenge would have to identify the facility and state the grounds upon which the challenge was based. Within 30 calendar days after receiving the challenge, the DEQ would have to determine its validity and give the permittee notification of a revised annual permit fee, and a refund, if appropriate, or a statement setting forth the reason or reasons why the annual permit fee was not revised. If the owner or operator of a facility desired to challenge its annual permit fee further, the owner or operator would have

an opportunity for a contested case hearing as provided under the Administrative Procedures Act.

The Attorney General could bring an action for the collection of the annual permit fee.

Permit Issuance Timeline

Under the Act, when a person applies for an NPDES permit, the DEQ must grant or deny it within 180 days after receiving a complete application, unless both parties agree to extend the time period. The bill would retain this deadline for new permits. Permits would have to be reissued by September 30 of the year following submittal of an administratively complete application.

Fund

The bill would create the National Pollutant Discharge Elimination System Fund in the State Treasury. The State Treasurer could receive money or other assets from any source for deposit into the Fund, and would have to direct the investment of the Fund. The Treasurer would have to credit to the Fund interest and earnings from Fund investments. Money in the Fund at the close of the fiscal year would have to remain in the Fund and not lapse to the General Fund.

The DEQ would have to spend money from the Fund, upon appropriation, only for administration of the NPDES program including, but not limited to, all of 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 conducted to determine a discharger's permit compliance status, including inspections, discharge monitoring, and review of submittals.
- Laboratory services.
- Enforcement.
- Program administration activities.

Report

Each year by January 1, beginning in 2006, the DEQ would have to prepare a report and

submit it to the Governor, the Legislature, the chairs of the Senate and House standing committees with primary responsibility for issues related to natural resources and the environment, and the chairs of the subcommittees of the Senate and House Appropriations Committees with primary responsibility for appropriations to the DEQ. The report would have to detail the departmental activities of the previous fiscal year, funded by the NPDES Fund. At a minimum, the report would have to include each of the following, as it related to the DEQ:

- The number of full-time equated positions performing each of the following functions: permit issuance and development, compliance, and enforcement.
- The number of new NPDES permit applications received by the DEQ in the preceding year.
- The number of renewal permits in the preceding year.
- The number of permit modifications requested in the preceding year.
- The number of staff hours dedicated to each of the proposed fee categories.
- The number of permits issued for fee categories.
- The average number of days for review of a permit from the date it was determined to be administratively complete.
- The number of applications denied.
- The number of permit applications withdrawn by the applicant.
- The percentage and number of permit applications that were reviewed for administrative completeness within 10 days of receipt by the DEQ.
- The percentage and number of permit applications submitted to the DEQ that were administratively complete as received.
- The percentage and number of new permit applications for which the DEQ took a final action within 180 days.
- The percentage and number of permit renewals and modifications processed within the required time.
- The number of permits reopened by the DEQ.
- The number of unfilled positions dedicated to the NPDES program.
- The amount of revenue in the Fund at the end of the fiscal year.

MCL 324.3111 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

Currently, 33 other states charge a fee for NPDES permits, and Michigan would be the last Great Lakes state to do so. Establishing an NPDES permit fee would demonstrate to Michigan citizens and the EPA that the State is committed to maintaining and improving its NPDES program, even in difficult budget times. Funding the NPDES program through its permit holders would enable the State to support the existing program at a level close to current State and Federal funding. The bill would generate about \$3.5 million from the fees to the new NPDES Fund, and the DEQ appropriations bill adopted by the Senate would appropriate an additional \$2 million from the General Fund. The funding for fiscal year 2003-2004, then, would represent an 8.5% increase over last year's funding; this modest increase could be put toward compliance inspections, a critical program function.

Response: Any estimate of appropriations from the General Fund, or the DEQ budget, is currently preliminary, and should not be counted on as dedicated funding.

Opposing Argument

The revenue that would be collected under the bill, about \$3.5 million, is less than half of the \$7.2 million suggested by the Governor, and considerably less than other Great Lakes states collect under the NPDES program. For example, Ohio assesses \$5.5 million in fees, Indiana collects \$5.2 million, and Illinois recently approved a \$15 million fee. Michigan's proposed \$3.5 million would not provide enough funding for compliance assistance, something the regulated community has requested, nor would it be enough to provide adequate compliance inspections. The Department has reported that, with the \$2 million it currently receives for compliance and monitoring, permit staff are able to visit facilities only every three to four years, and take unannounced test samples only every five to six years. The Department, then, can merely react to permit violations, rather than proactively prevent them. In the long run, more employees are needed to address the escalating number of permit violations.

A recent article in the *Washington Post* (6-6-03) highlighted the failure of states to enforce the Clean Water Act adequately, and the lack of EPA oversight of these states. The *Post* reported that about 25% of the nation's largest industrial plants and water treatment facilities are in serious violation of the Act, and that Michigan is one of 14 states with a history of "significant noncompliance" with discharge requirements above the national average. To address this, the EPA will create 10 regional watch lists of the most flagrant violators. As a result, Michigan will be under stricter surveillance by the EPA. If facilities in the State continue to pollute at the current rate, the EPA could take away the State's authorization to administer the NPDES program, resulting in fines and court action.

Response: The proposed fees would be reasonable, given that this would be a new cost to businesses suffering in the slow economy. Ideally, permittees should pay enough to cover the cost of issuing the permits; paying for full administration of the program would go beyond the scope of a "fee for service" and become a new tax on business. Further, companies should not be "punished" preemptively for polluting, as fines are already in place for those who violate the law. According to the *Lansing State Journal* (7-6-03), the DEQ assessed \$4 million in penalties in fiscal year 2001-02 for excess water pollution. Fees beyond those proposed by the bill would be unfair to facility owners and operators who do comply with the law, and could deter companies from locating in Michigan.

Opposing Argument

The bill's proposed method of calculating permit fees would oversimplify the permitting process by basing fees primarily on volume of discharge. Other qualities, such as temperature and toxicity of the discharge, should be weighted more heavily to discourage potential harm to human health and to water ecology. For example, some facilities with old equipment still legally discharge small amounts PCBs, a class of oils banned by the EPA in 1979. This chemical, a probable human carcinogen, is stored in the fatty tissues of animals at increasing levels as the food chain ascends, where it is passed on to offspring in the womb and through the mother's milk. Besides cancer, PCBs are associated with neurological and developmental health problems, such as reduced immune function, low birth weight, and learning disabilities. Also, some power

plants have permits to discharge a small amount of lead, a heavy metal that can lead to neurological disorders, attention-deficit disorder, and lowered IQ in children. Further, city waste treatment facilities experiencing overflow during heavy rains dump E. coli into waterways, making rivers and lakes temporarily unsafe for fishing, swimming, or recreation. It is important that the NPDES permit fees be assessed in a way that would discourage further pollution and fund the DEQ's ongoing monitoring of toxicity levels.

Response: The method proposed by the bill to calculate the NPDES permit fees would be more objective than one based on a complex formula, and easier for businesses to anticipate. Further, it would use the categories established by the EPA (major and minor facilities), which do take into account the toxicity levels of the discharge for nonmunicipal facilities.

Legislative Analyst: Claire Layman

FISCAL IMPACT

Under the bill, total annual revenue from both permit fees and application fees would be approximately \$3,490,000.

The bill would set flat, annual permit fees for permitted dischargers. The fees would vary according to a facility's classification as major or minor, high or low flow, and whether the permit is an individual or general permit. There are 1,407 NPDES permits issued under this program. Permit fee revenue of approximately \$3,392,000 would be collected annually under the bill.

The bill also would establish application fees, which would vary by the type of facility. NPDES permits are effective for five years. Total collections over five years of application fees would be about \$495,000, with \$98,000 collected annually.

In the House-passed version of the FY 2003-04 budget for the DEQ, the program is supported with \$4,267,800 General Fund, which is 85% of the program's current-year appropriations. The budget bill would appropriate \$5,020,900 if a fee for the NPDES program were enacted before September 30, 2003.

The version of the DEQ appropriations bill adopted by the Senate includes \$3,524,500 in NPDES fee revenue and \$1,922,900 General

Fund for a total of \$5,447,400 in State spending for the NPDES program in FY 2003-04. This is an increase of \$426,500 over current-year funding for the program. The Senate-passed appropriations bill specifies that the funding increase is for compliance activities.

If this fee proposal is not adopted, two situations might occur. If General Fund support for the NPDES program is restored, then the current program will continue. If General Fund support is not restored, then the State will no longer have the resources to administer these permits. Since this is a Federal program, the EPA would be required to establish an NPDES permit program in Michigan. All other states in EPA Region 5 operate their own NPDES permit program and the EPA does not currently have the resources and staff to operate such a permit program. According to the Department, it would take EPA Region 5 approximately one year to organize an administrative office for this purpose.

Fiscal Analyst: Jessica Runnels

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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.