Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 785 (as introduced 8-27-09)
Sponsor: Senator Patricia L. Birkholz
Committee: Natural Resources and Environmental Affairs

Date Completed: 9-8-09

CONTENT

The bill would amend Parts 52 (Strategic Water Quality Initiatives), 88 (Water Pollution and Environmental Protection Act), 301 (Inland Lakes and Streams), 303 (Wetlands Protection), and 325 (Great Lakes Submerged Lands) of the Natural Resources and Environmental Protection Act (NREPA) to do all of the following:

- **Include the establishment of wetland mitigation banks among the purposes eligible for loans from the Strategic Water Quality Initiatives Loan Program.**
- **Expand uses of the Clean Water Fund.**
- **Revise provisions regarding the establishment by the Department of Environmental Quality (DEQ) of minor project categories of wetlands activities and projects.**
- **Revise notice and hearing requirements for wetland project permits.**
- **Revise the definition of "wetland".**
- **Require the DEQ to implement a pilot program aimed at increasing the efficiency of the wetlands project permitting process, and a pilot program to facilitate the development of wetland mitigation banks.**
- **Require the DEQ to report pilot program results and recommendations to a proposed Wetland Advisory Council.**
- **Require the DEQ Director to designate a bay area of the Great Lakes where a permit would not be required for the mowing of vegetation on beaches, under certain conditions.**
- **Require the DEQ, in consultation with the Michigan Department of Agriculture (MDA), to identify Michigan land suitable for cranberry production activities.**
- **Authorize the DEQ to impose on certain wetland permits a requirement for compensatory wetland mitigation.**
- **Require the DEQ to coordinate permits under Parts 301, 303, and 325 consistent with nationwide permits, as appropriate.**
- **Require the DEQ to issue a general permit that authorized shoreline management activities if they were authorized by a permit issued by the U.S. Army Corps of Engineers (USACE).**
- **Require the DEQ to pursue an agreement with the USACE to issue State programmatic general permits under Federal law.**
- **Require the DEQ to develop a program to facilitate wetland restoration and enhancement projects in coordination with government entities and nongovernmental groups.**
- **Require the DEQ to pursue an agreement with the U.S. Environmental Protection Agency (EPA) to expand the categories of discharges subject to a waiver from certain requirements under Federal law.**

-- **Authorize the DEQ to provide certification that a discharge into navigable water complied with applicable requirements.**
-- **Create the "Wetland Advisory Council" and require it to report to the Governor and the Legislature on the administration and enforcement of the State's wetlands program, including recommendations on potential long-term changes in program structure.**

The bill is described below in further detail.

Part 52: Strategic Water Quality Initiatives Loan Program

Under Part 52, the Michigan Municipal Bond Authority, in consultation with the Department of Environmental Quality, must establish a Strategic Water Quality Initiatives Loan Program. The Program provides low-interest loans to municipalities to provide assistance for improvements to a sewage system for one or more of the following:

-- The reduction or elimination of the amount of groundwater or storm water entering a sanitary sewer lead or a combined sewer lead.
-- Upgrades or replacements of failing on-site septic systems that are adversely affecting public health and/or the environment.

The bill would delete the reference to "improvements to a sewage system", and include the establishment of wetland mitigation banks (described below) among the purposes for which loans could be provided under the Program. Up to $5.0 million in loans could be provided for this purpose.

Part 88: Clean Water Fund

Part 88 requires the DEQ to spend money in the Clean Water Fund, upon appropriation, for any of the following:

-- To implement the programs described in the DEQ's document entitled, "A Strategic Environmental Quality Monitoring Program for Michigan's Surface Waters", dated January 1997.
-- Water pollution control activities.
-- Wellhead protection activities.
-- Storm water treatment projects and activities.

The bill would add to the authorized purposes the implementation of Parts 301 (Inland Lakes and Streams), 303 (Wetlands Protection), 315 (Dam Safety), 323 (Shorelands Protection and Management), and 325 (Great Lakes Submerged Lands); the floodplain permit program under Section 3104 of NREPA, and Section 117 of the Land Division Act.

(Section 3104 of NREPA prohibits a person from altering a floodplain except as authorized by a floodplain permit issued by the DEQ. Section 117 of the Land Division Act requires the DEQ to review a preliminary plat and approve it, approve it subject to conditions, or reject it. Under that section, a preliminary plat must be accompanied by a fee of $500, which the DEQ must forward to the State Treasurer for deposit in the Land and Water Management Permit Fee Fund.)

Part 301: Inland Lakes & Streams

Under Part 301, a person without a permit from the DEQ may not do any of the following, subject to certain exceptions:

-- Dredge or fill bottomland.
-- Construct, enlarge, extend, remove, or place a structure on bottomland.
-- Erect, maintain, or operate a marina.
-- Create, enlarge, or diminish an inland lake or stream.
-- Structurally interfere with the natural flow of an inland lake or stream.
-- Construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of the artificial waterway is within 500 feet of the ordinary high-water mark of an existing inland lake or stream.
-- Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.

Except as otherwise provided, upon receiving an application for a permit, the DEQ must submit copies for review to the

Director of the Department of Community Health (DCH) or the local health department designated by the DCH Director; to the city, village, or township and the county where the project is to be located; to the local conservation district; to the watershed council established under Part 311 (Local River Management); to the local port commission, if any; and to the people required to be included in the application. The bill would eliminate the requirement that the DEQ submit copies to the people required to be included in the application.

Currently, the DEQ, by rule, may establish minor project categories of activities and projects that are similar in nature and have minimal adverse environmental impact. The bill, instead, would require the Department, after providing notice and an opportunity for a public hearing, to establish minor project categories of activities and projects that are similar in nature, have minimal adverse environmental effects when performed separately, and would have only minimal cumulative adverse affects on the environment.

Under Part 301, each copy of a permit application must be accompanied by a statement that unless a written request is filed with the DEQ within 20 days after the submission for review, the Department may grant the application without a public hearing where the project is located. The Department may hold a public hearing upon the written request of the applicant or a riparian owner or a person or governmental unit that is entitled to receive a copy of the application. At least 10 days' notice of a hearing must be given by publication in a newspaper circulated in the county where the project is to be located, to the person requesting the hearing, and to the people and governmental units that are entitled to a receive a copy of the application. The DEQ may act upon an application for an activity or project within a minor project category without providing notices or holding a public hearing. The bill would eliminate this public hearing exemption.

Currently, a final inspection or certification of a minor project completed under a permit is not required, but all other provisions of Part 301 apply. The bill would delete the statement that an inspection or certification is not required. Also, provisions of Part 301 applicable only to general permits would not apply to a minor project.

Under Part 301, the DEQ, after notice and an opportunity for a public hearing, may issue general permits on a statewide basis or within a local unit of government for projects that are similar in nature, that will cause only minimal adverse environmental effects when performed separately, and that will have only minimal cumulative adverse effects on the environment. Under the bill, before authorizing a specific project to proceed under a general permit, the DEQ could not provide notice or hold a public hearing and could not typically require a site inspection.

Part 303: Wetlands Protection

Definition of "Wetland". Under Part 303, "wetland" means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh, and that is any of the following:

-- Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.
-- Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and more than five acres in size.
-- Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream, and five acres or less in size if the DEQ determines that protection of the area is essential to the preservation of the State's natural resources from pollution, impairment, or destruction and the DEQ has notified the owner.

The bill would refer to land possessing the specified characteristics and meeting the prescribed criteria as determined pursuant to Federal wetland delineation standards used to implement a section of Title IV of the Federal Water Pollution Control Act, 33 USC 1344 (which governs permits for the discharge of dredged or fill material into navigable waters).

Pilot Program: Efficiency. The bill would require the DEQ to implement a pilot program to facilitate the role of local units of government, conservation districts, or

nonprofit organizations in assisting people with completing permit applications, avoiding and minimizing impacts from a proposed project, using best management practices in a proposed project, and otherwise complying with Part 303. The bill specifies that the goals of the pilot program would include increasing the efficiency of the permitting process through better use of all available resources, including DEQ staff, while protecting Michigan's wetland. The bill provides that the pilot program would not affect the DEQ's authority to make regulatory decisions in any way.

Within 60 days after the bill took effect, the DEQ Director would have to designate at least three entities to participate in the pilot program, with the goal of selecting at least one local unit of government, one conservation district, and one nonprofit organization. A proposed designation would have to be posted on the DEQ's website for public review and comment for at least 21 days before the designation was made.

By April 1, 2012, the DEQ and entities participating in the program would have to report to the Wetland Advisory Council on program results and recommendations for further refining the program.

The proposed section regarding this pilot program would be repealed on October 1, 2012.

Pilot Program: Wetland Mitigation Banks. Under the bill, the DEQ would have to implement a pilot program for assisting local units of government and partnering nonprofit and for-profit organizations in the development of wetland mitigation banks. This assistance would have to include supplying maps of potential wetland restoration areas for site selection, reviewing potential sites for mitigation banks, and, if the mitigation bank sponsor were a county with a population of at least 500,000, expediting review of conceptual design plans.

Within 180 days after the bill took effect, the DEQ Director would have to designate two counties with a population of at least 500,000. Those counties, or municipalities and organizations in them, would be eligible to participate in the pilot program. A proposed designation would have to be posted on the DEQ's website for public review and comment at least 21 days before the designation was made.

By April 1, 2012, the DEQ and participating entities would have to report to the Wetland Advisory Council on program results and recommendations for further refining the program.

The proposed section regarding this pilot program would be repealed on October 1, 2012.

Mowing Vegetation. The bill would eliminate provisions that allowed beach maintenance activities that met certain conditions in a wetland without a permit until November 1, 2007, and removal of vegetation without a permit until June 5, 2006. The bill would delete the definition of "beach maintenance activities", which means any of the following in the area of Great Lakes bottomlands lying below the ordinary high-water mark and above the water's edge:

-- Manual or mechanized leveling of sand.
-- Mowing of vegetation.
-- Manual de minimis removal of vegetation.
-- Grooming of soil.
-- Construction and maintenance of a path.

(The bill would delete similar provisions regarding beach maintenance activities from Part 325.)

Under Part 303, except as otherwise provided or by a permit issued by the DEQ, a person may not do any of the following:

-- Deposit or permit the placement of fill material in a wetland
-- Dredge, remove, or permit the removal of soil or minerals from a wetland.
-- Construct, operate, or maintain any use or development in a wetland.
-- Drain surface water from a wetland.

Under the bill, this provision would not apply to the mowing of vegetation between the ordinary high-water mark and the water's edge in a designated bay area if one or more of the following conditions were met:

-- The mowing was limited to a pathway that was not more than 10 feet long and at least four inches high and did not occur in an environmental area (i.e., an area of the shoreland determined by the

DEQ on the basis of studies and surveys to be necessary for the preservation and maintenance of fish and wildlife).

-- The mowing was limited to areas mowed previously in accordance with Part 303, to the lesser of the width of the property or 100 feet, and to a height of at least four inches, and did not occur in an environmental area.

-- The mowing was limited to an area vegetated predominantly by nonnative species or invasive species and was conducted as part of a vegetation control plan in accordance with DEQ recommendations.

In addition, the mowing could not disturb soil or plant roots and could not violate Part 365 (Endangered Species Protection) of NREPA or rules promulgated under it, or the Endangered Species Act (Public Law 93-205) or rules promulgated under it. All collected vegetation would have to be disposed of properly outside of any wetland, and thatch could not be removed by mechanical raking or other methods that disturbed soil or plant roots.

(Currently, "mowing of vegetation" means the cutting of vegetation to a height of not less than two inches without disturbance of soil or plant roots. The bill would eliminate the reference to height.)

Within 42 days after the bill took effect, the DEQ Director would have to designate a bay area of the Great Lakes to which these provisions would apply. In selecting the bay area, the Director would have to consider the expressed need for mowing in the area. A proposed designation would have to be posted on the DEQ's website for public review and comment for at least 21 days before the designation was made.

The section regarding the mowing of vegetation would be repealed effective October 1, 2012.

Cranberry Production. Within 180 days after the bill's effective date, the DEQ, in consultation with the Michigan Department of Agriculture, would have to identify at least 2,500 acres of land suitable for cranberry production activities. The DEQ would have to give priority to upland sites, sites that had been drained for agricultural use and were no longer wetland, or sites that had been drained for agricultural use and continued to be wetland. The sites could not include sensitive natural resource areas or natural or undisturbed wetlands. The DEQ and the MDA would have to make available to the public a map of the identified areas. The bill provides that the map would be for informational purposes and would not constitute a regulatory determination for purposes of Part 303.

(Under the bill, a sensitive natural resource area would include any of the following:

-- A federally designated wild and scenic river.

-- A State designated natural river.

-- A State or federally designated wilderness or environmental area.

-- A riverine floodway, unless qualified as a minor project under Part 31 (Water Resources Protection) of NREPA.

-- Habitat of State or federally listed or proposed threatened or endangered species, unless alternative procedures were followed to coordinate with Federal agencies or the landowner obtained a letter of no impact from the Department of Natural Resources (DNR).

-- An identified historic or archeological area.

-- An identified recharge area for drinking water aquifers.

-- An identified rare or unique ecological type.)

After 2,000 acres of identified sites were developed for cranberry production activities, at least an additional 2,500 acres would have to be identified.

The DEQ would have to consider construction of cranberry beds, including associated dikes and water control structures associated with dikes, such as headgates, weirs, and drop inlet structures, to be a water-dependent activity. ("Water-dependant" would mean requiring access or proximity to or siting within an aquatic site to fulfill its basic purpose.) Pursuant to Sections 30302(1)(c) and 30311(2)(i), the Department would have to give due consideration to the location of cranberry beds as a crop that for agricultural and economic purposes is most ideally suited to be grown within wetlands.

(Section 30302(1)(c) provides that the Legislature finds that wetlands are valuable as an agricultural resource for the

production of food and fiber, including certain crops that may be grown only on sites developed from wetland. Under Section 30311, a wetlands permit may not be approved unless the DEQ determines that its issuance is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful. In determining whether the activity is in the public interest, the benefit that reasonably may be expected to accrue from the proposal must be balanced against the reasonably foreseeable detriments of the activity, and specific criteria must be considered. Under Section 30311(2)(i), these include the public and private economic value of the proposed land change to the general area.)

The following activities associated with cranberry operations would not be considered water dependent:

-- The construction of roads, ditches, reservoirs, and pump houses that are used during the cultivation of cranberries.
-- The construction of secondary support facilities for shipping, storage, packaging, parking, and similar purposes.

Under Part 303, if a landowner requests a preapplication meeting regarding a proposed project or permit application, the DEQ must meet with the person to review the proposed project or application in its entirety. Except as otherwise provided, the request must be accompanied by a fee. For a preapplication meeting at the DEQ's district office, the fee is $150. The fee for a meeting at the project site is $250 for the first acre or portion of an acre of project area, plus $50 for each additional acre or portion of an acre, up to $1,000. Under the bill, until October 1, 2012, there would be no fee for a preapplication meeting for cranberry production activities, whether at the district office or project site.

Feasible & Prudent Alternatives. Under Part 303, a permit for a listed activity may not be approved unless the DEQ determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful. In determining whether the activity is in the public interest, the benefit that reasonably may be expected to accrue from the proposal must be balanced against the reasonably foreseeable detriments of the activity. The decision must reflect the national and State concern for the protection of natural resources from pollution, impairment, and destruction. In making its determination, the DEQ must consider specific criteria, including the availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity. Additionally, a permit may not be issued unless it is shown that an unacceptable disruption to the aquatic resources will not result. In determining whether a disruption is unacceptable, the DEQ must consider certain criteria, including feasible and prudent alternatives.

Under the bill, the DEQ would have to make a determination of reasonable and prudent alternatives with respect to a permit for a commercial or agricultural activity after review by a deputy director. The deputy director's review would have to include or be preceded by a consultation with the Michigan Economic Development Corporation and applicable regional and local economic development authorities.

The bill provides that the DEQ's Land and Water Management Division Operating Procedure Number 303-08-01 for the evaluation of feasible and prudent alternatives under Part 303 would be void and could not be used by Department staff. The DEQ could not develop any further operating procedures or guidance for the evaluation of feasible and prudent alternatives, but would have to follow Department rules to the extent that they were not more stringent than corresponding Federal rules.

General Permit Conditions. The bill specifies that a permit issued under Part 303 could not be valid for more than five years. The DEQ could establish a reasonable time when construction, development, or use authorized under any permit issued under Part 303 had to be completed or terminated. The Department could impose on any permit or authorization under a general permit under Part 303 conditions designed to do any of the following:

-- Remove or reduce an impairment to wetland benefits, as set forth in Section

30302, that would otherwise result from the project.
-- Improve the water quality that would otherwise result from the project.
-- Remove or reduce the effect of a discharge of fill material.

The DEQ could impose a condition on an authorization under a general permit only after consultation with the applicant.

(Section 30302 contains a legislative finding that a loss of a wetland may deprive the people of the State of some or all of the following benefits derived it:

-- Flood and storm control by the hydrologic absorption and storage capacity of the wetland.
-- Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, and rare, threatened, or endangered wildlife species.
-- Protection of subsurface water resources and provision of valuable watersheds and recharging ground water supplies.
-- Pollution treatment by serving as a biological and chemical oxidation basin.
-- Erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.
-- Sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.)

Compensatory Wetland Mitigation. Under the bill, the DEQ could impose as a condition on any permit, other than a general permit, under Part 303 a requirement for compensatory wetland mitigation. The Department could approve one or more of the following methods of compensatory wetland mitigation:

-- The acquisition of approved credits from a wetland mitigation bank.
-- The restoration of previously existing wetlands, which would be preferred over the creation of new wetlands where none existed previously.
-- The creation of new wetlands, if the permit applicant demonstrated that ecological conditions necessary for establishment of a self-sustaining wetland ecosystem existed or would be created.
-- The preservation of exceptional wetlands.

("Exceptional wetland" would mean wetland that provides physical or biological functions essential to the State's natural resources and that may be lost or degraded if not preserved through an approved site protection and management plan for the purposes of providing compensatory wetland mitigation.)

For compensatory wetland mitigation other than the acquisition of approved credits, a permit applicant would have to submit a mitigation plan to the DEQ for approval. In approving a plan, the Department would have to consider how the location and type of wetland mitigation supported the sustainability or improvement of aquatic resources in the watershed where the activity was permitted. The applicant would have to provide for permanent protection of the wetland benefits of the mitigation site. The DEQ could accept a conservation easement to protect wetland mitigation and associated uplands.

If a permittee carried out compensatory wetland mitigation by a method other than the acquisition of approved credits in cooperation with public agencies, private organizations, or other parties, the permittee would remain fully responsible for the mitigation.

The DEQ could require financial assurance to ensure that compensatory wetland mitigation was accomplished as specified. To ensure that wetland benefits were replaced by compensatory wetland mitigation, the DEQ could release financial assurance only after the applicant or mitigation bank sponsor had completed monitoring of the site and demonstrated compliance with performance standards in accordance with a schedule in the permit or mitigation banking agreement.

Minor Project Categories & General Permits. Under the bill, after providing notice and an opportunity for a public hearing, the DEQ could establish minor project categories of activities that were similar in nature, had minimal adverse environmental effects when performed separately, and would have only minimal cumulative adverse effects on the environment. The DEQ could act upon an application under Part 303 for an activity within a minor project category without holding a public hearing or providing notice pursuant to Section 30307(1) or (3). A

minor project category could not be valid for more than five years, but could be reestablished. All other provisions of Part 303, except those applicable only to general permits, would apply to a minor project.

(Under Section 30307(1), within 60 days after receiving a completed application and fee, the DEQ may hold a hearing in the county where the applicable wetland is located. The Department may approve or disapprove a permit application without a public hearing unless a person requests a hearing in writing within 20 days after the required mailing of notification of the permit application or unless the DEQ determines that the application is of significant impact so as to warrant a public hearing. Under Section 30307(3), a person who desires notification of pending permit applications may make a written request to the DEQ accompanied by an annual fee of $25, which must be credited to the State's General Fund. The DEQ must prepare a biweekly list of applications and mail copies promptly to the people who requested notice.)

Part 303 provides that a general permit is not valid for more than five years. The bill would allow a general permit to be reissued.

Under the bill, before authorizing a specific project to proceed under a general permit, the DEQ could not provide notice or hold a public hearing and could not typically require a site inspection. The Department would have to issue an authorization under a general permit if the conditions of the permit and the requirements of Section 30311 were met. In determining whether to issue an authorization under a general permit, however, the DEQ could not consider off-site alternatives to be feasible and prudent alternatives.

(Section 30311 requires the Department to determine whether the issuance of a permit is in the public interest, whether the permit is necessary to realize the benefits derived from the activity, and whether the activity is otherwise lawful.)

If the DEQ determined that activity in a proposed project, although within a minor project category or a general permit, was likely to cause more than minimal adverse effects on aquatic resources, including high-value aquatic habitats, it could require that the application be processed under Section 30307.

The DEQ would have to coordinate general permit and minor project categories under Parts 303, 301, and 325 consistent with nationwide permits, as appropriate.

Nationwide & Other Required Permits. The bill would require the DEQ to propose or maintain general permits under Part 303 equivalent to the following nationwide permits, to the extent applicable to wetland, without further limitations:

-- Maintenance.
-- Scientific measuring devices.
-- Survey activities.
-- Oil spill cleanup.
-- Moist soil management.
-- Cleanup of hazardous and toxic waste.
-- Storm water management facilities.
-- Pipeline safety program designated time-sensitive inspections and repairs.

The DEQ would have to propose or maintain general permits or minor project categories equivalent to the following nationwide permits, to the extent applicable to wetland, but subject to additional limitations that the Department could establish after receiving public comment and considering best management practices:

-- Outfall structures and associated intake structures.
-- Minor discharges.
-- Utility line activities.
-- Expansion of existing cranberry production activities.

The bill would require the DEQ to propose or maintain general permits or minor project categories for all of the following:

-- Temporary recreational structures.
-- Linear transportation projects.
-- Aquatic habitat restoration, establishment, and enhancement activities, including reversion of temporary wetland restorations.
-- Residential developments.
-- Completed enforcement actions.
-- Temporary construction, access, and dewatering.
-- Agricultural activities.
-- Reshaping existing drainage ditches.
-- Recreational facilities.
-- Cranberry production activities.

The general permit or minor project category pertaining to cranberry production activities would not apply to activities in sensitive natural resource areas or natural or undisturbed wetlands.

Shoreline Management Activities. Under the bill, the DEQ would have to issue a general permit that, subject to specified conditions, authorized shoreline management activities in a designated bay area if they were authorized by a permit issued by the USACE under 33 USC 1344 (described below). This provision would not require a permit for activities that were exempt from permit requirements under the bill. A general permit issued under these provisions could not authorize any of the following:

-- Activities in an environmental area or a critical dune area.
-- Activities that violated Part 365 (Endangered Species Protection) or rules promulgated under it, or the Endangered Species Act or rules promulgated under it.

("Shoreline management activities" would mean any of the following in the area of Great Lakes bottomlands lying below the ordinary high-water mark and above the water's edge:

-- Leveling of sand.
-- Grooming of sand.
-- Construction and maintenance of a path.
-- Mowing of vegetation.

The bill would add this definition to Parts 303 and 325.)

(Under 33 USC 1344, in carrying out his or her functions relating to the discharge of dredged or fill material, the Secretary of the Army, acting through the Chief of Engineers, may, after notice and opportunity for public hearing, issue general permits on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if he or she determines that the activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.)

Within 180 days after the bill took effect, the DEQ would have to pursue an agreement with the USACE for the Corps to issue state programmatic general permits under 33 USC 1344 for activities in water over which the Corps retains jurisdiction under Section 10 of the Rivers and Harbors Appropriations Act (33 USC 403).

(Section 10 of the Rivers and Harbors Appropriations Act prohibits the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the U.S.; and provides that it is not lawful to build any structure in any port, roadstead, haven, harbor, canal, navigable river, or other water of the U.S., outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.)

These provisions would be repealed on October 1, 2012.

Wetland Restoration & Enhancement Projects. The bill would require the DEQ to develop a distinct program to facilitate ecologically responsible voluntary wetland restoration and enhancement projects in coordination with State, Federal, tribal, and nongovernmental groups specializing in wetland restoration and conservation. The program would have to include enhancing coordination, consistency, and operational procedures and improving and streamlining the permitting process to facilitate a net gain in wetland quantity and/or quality.

Civil Fines & Fees. The civil fines collected under Part 303 must be forwarded to the State Treasurer for deposit in the State's General Fund. The fees collected under Part 303 must be deposited in the Land and Water Management Permit Fee Fund. Under the bill, these provisions would not apply to fines or fees collected under an ordinance adopted under Section 30307.

(Under Section 30307, a local unit of government may regulate wetland within its boundaries, by ordinance, only as provided under Part 303. An ordinance may not provide a different definition of wetland than is provided in Part 303, except that it may regulate wetland of less than five acres. If the ordinance regulates wetland smaller than two acres, the local unit must approve an application for a wetland use permit unless it determines that the wetland is

essential to the preservation of the local unit's natural resources, according to specified criteria.)

Discharge Waiver. Under the bill, the DEQ would have to pursue an agreement with the EPA to expand the categories of discharges subject to the waiver from the requirements of Section 404(j) of Title IV of the Federal Water Pollution Control Act (33 USC 1344), pursuant to Section 404(k) of that Act.

(Section 404(j) requires each state that is administering a permit program to transmit to the EPA Administrator a copy of each permit application the state receives and notify the Administrator of every action related to the consideration of an application, including each permit the state proposes to issue and a copy of each proposed general permit the state intends to issue. If the Administrator intends to provide written comments to the state, he or she must notify the state within 30 days after receiving an application or proposed general permit. The Administrator must provide the comments within 90 days after receiving an application or proposed permit.

If a state is notified of written comments by the Administrator, the state may not issue a proposed permit after the 90th day if the Administrator objects to the permit unless the state modifies the permit in accordance with the comments. In any case where the Administrator objects to the issuance of a permit, on the state's request, a public hearing must be held on the objection. If the state does not resubmit a revised permit, the Secretary of the Army may issue the permit in accordance with applicable guidelines and requirements.

Section 404(k) authorizes the EPA Administrator to waive those requirements in accordance with certain guidelines at the time of the approval of a state program for any category of discharge within the state submitting the program.)

DEQ Certification. The bill would authorize the DEQ to provide certifications under Section 401 of Title IV of the Federal Water Pollution Control Act (33 USC 1341).

(Under that section, any applicant for a Federal license or permit to conduct any activity, including the construction or operation of facilities, that might result in any discharge into the navigable waters, must give the licensing or permitting agency a certification from the state in which the discharge originates or, if appropriate, from the interstate water pollution control agency with jurisdiction over the navigable waters at the point where the discharge originates, that the discharge complies with applicable requirements.)

Wetland Advisory Council. The bill would create the Council within the DEQ. The Council would have to include the DEQ Director or his or her designee. The Director would have to invite one representative of each of the following to serve as Council members: the USACE, the EPA, and the U.S. Department of Agriculture Natural Resources Conservation Service.

In addition, the Council would have to include the MDA and DNR Directors or their designees. The Senate Majority Leader would have to appoint one individual from each of the following: a statewide association of homebuilders, the largest statewide conservation organization, and a statewide association of local units of government. The Speaker of the House of Representatives would have to appoint one individual from each of the following: a statewide environmental protection organization, the largest statewide agriculture organization, and a statewide association of realtors. The Governor would have to appoint a university professor with expertise in wetland science and a professional wetland consultant who regularly submitted applications for permits and obtained them from the DEQ, as well as one individual representing each of the following: a watershed organization, utilities, a conservation district, a statewide association of businesses, and the general public.

The appointments to the Council would have to be made within 30 days after the bill's effective date.

An appointed member would serve for a term of three years. If a vacancy occurred, it would have to be filled for the unexpired term in the same manner as the original appointment. The appointing officer could remove a Council member for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or for any other good cause.

The DEQ Director would have to call the first Council meeting. At that meeting, the Council would have to elect from among its members a chairperson and any other officers that it considered necessary or appropriate. After the first meeting, the Council would have to meet at least quarterly, or more frequently at the call of the chairperson or if requested by at least two members.

A majority of the members would constitute a quorum for the transaction of business at a Council meeting. A majority of the members present and service would be required for official Council action. The Council would be subject to the Open Meetings Act and the Freedom of Information Act. Members would serve without compensation. The Council members representing the DNR or the DEQ, however, would serve without additional compensation.

By October 1, 2010, the Council would have to submit a report to the Governor, the DEQ, and the standing committees and Appropriations subcommittees of the Legislature with primary responsibility over natural resources and environmental issues. The report would have to evaluate and make recommendations on all of the following:

-- Improving the permit application, review, and decision-making process under Part 303, including consideration of the quality of applications submitted; and the effect of mandatory decision-making time frames on meeting the purposes of Part 303 and, if appropriate, the time frames that should apply.
-- Consistent application of the feasible and prudent alternative standard.
-- The point in the DEQ's process of decision-making on a permit application at which the possibility of mitigation should be considered.
-- Actions necessary to adopt and implement measures determined by the U.S. EPA to support consistency with the requirements of 33 USC 1344, as set forth in "Final Report Results of the U.S. Environmental Protection Agency Region 5 Review of Michigan Department of Environmental Quality's Section 404 Program", dated May 2008.

By October 1, 2012, the Council would have to submit another report to the Governor, the DEQ, and the applicable standing committees and Appropriations subcommittees of the Legislature. This report would have to evaluate and make recommendations on all of the following:

-- Improving coordination and reducing duplication of effort with the USACE.
-- The appropriate means and level of program funding under Part 303.
-- Minor permit categories and general permits equivalent to the specified nationwide permits and other categories required under the bill.
-- The appropriateness of State programmatic general permits under 33 USC 1344 for activities in water over which the Corps retains jurisdiction under the Rivers and Harbors Appropriations Act as a means of reducing regulatory burdens from dual Federal and State regulation.
-- The promotion of the development of wetland mitigation banks.
-- Ways for the public and interested parties to advise the DEQ on a continuing basis concerning the administration and enforcement of Part 303.

Additionally, the report would have to evaluate and make recommendations on potential long-term changes in program structure, including all of the following:

-- The appropriate role of local units of government and conservation districts in the administration of Part 303.
-- Scientific methods to achieve more consistent and accurate determinations of wetland functions and values for reviewing applications for permits, watershed planning, conservation plans, and other purposes.
-- A certification process for professional wetland consultants.
-- The definition of wetland and wetland delineation methods, including the role of hydric soils as a factor in wetland delineation.

The scientific methods would have to include rapid wetland assessment and landscape level wetland assessment. Regarding the consultant certification process, the Council would have to consider information reported under the permitting process efficiency pilot program. In making recommendations pertaining to the definition of wetland and

wetland delineation methods, the Council would have to evaluate differences in the State and Federal wetlands programs.

("Rapid wetland assessment" would mean a method for generally assessing the functions, values, and condition of individual wetlands based on existing data and field indicators. "Landscape level wetland assessment" would mean the use of aerial photographs, maps, and other remotely sensed information to predict and evaluate wetland characteristics and functions in the context of the wetland's landscape position and hydrologic characteristics, the surrounding landscape, and the historic extent and condition of the wetland.)

Part 325: Great Lakes Submerged Lands

Minor Project Categories. Under the bill, after providing notice and opportunity for a public hearing, the DEQ could establish minor project categories of activities that were similar in nature, had minimal adverse environmental effects when performed separately, and would have only minimal cumulative adverse effects on the environment. The DEQ could act upon an application received pursuant to Section 32513 for an activity within a minor project category without providing noticed pursuant to Section 32514. A minor project category could not be valid for more than five years, but could be reestablished. All other provisions of Part 325, except those applicable only to general permits, would apply to a minor project.

(Under Section 32513, unless the DEQ has granted a permit or the Legislature has granted authorization, subject to certain exceptions, a person may not do any of the following:

-- Construct, dredge, commence, or do any work with respect to an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection of the waterway with any of the Great Lakes, including Lake St. Clair.
-- Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar waterway with any of the Great Lakes, including Lake St. Clair, for navigation or other purpose.
-- Dredge or place spoil or other material on bottomland.
-- Construct a marina.

Under Section 32514, upon receiving an application, the DEQ must mail copies to the Department of Community Health; the clerks of the county, city, village, and township, and the drain commissioner of the county or, if none, the road commissioner of the county, in which the project or body of water affected is located; and the adjacent riparian owners; accompanied by a statement that unless a written objection is filed with the DEQ within 20 days after the mailing, the Department may take action to grant the application.)

General Permits. Under Part 325, the DEQ, after notice and opportunity for a public hearing, may issue general permits on a statewide basis or within a local unit of government for a category of activities if it determines that they are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. Under the bill, before authorizing a specific project to proceed under a general permit, the DEQ could not provide notice or hold a public hearing and could not typically require a site inspection.

Part 325 specifies that a permit issued under it is not valid for more than five years. Under the bill, a general permit could be reissued.

Permit Application. Currently, before any work or connection specified in Section 32512 or 32512a is undertaken, a person must file an application with the DEQ. The bill would delete the reference to Section 32512a.

(Section 32512a authorizes the DEQ, after notice and opportunity for a public hearing, to issue general permits on a statewide basis or within a local unit of government for a category of activities if the Department determines that they are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.)

Repealer

The bill would repeal Section 32516, which required the DEQ Director to identify two areas of the shoreline of the Great Lakes and Lake St. Clair where the removal of vegetation between the ordinary high-water mark and the water's edge would be allowed without a permit under Part 325 or 303. Within one year after the designation was made, the Director could designate additional areas unless he or she determined that doing so would result in pollution, impairment, or destruction to the State's natural resources. Within designated areas, vegetation removal was allowed if the landowner had received a letter of approval from the DEQ confirming at least three of the following:

-- The area was unconsolidated material predominantly composed of sand, rock, or pebbles, or was predominantly vegetated by nonnative or invasive species.
-- The area met the preceding criterion as of January 1, 1997.
-- The removal of vegetation did not violate Part 365 or rules promulgated under it, or the Endangered Species Act or rules promulgated under that Act.
-- The area in which vegetation removal occurred was not an environmental area.

Additionally, the area in which vegetation removal occurred could not exceed 50% of the width of the upland riparian property or 100 feet, whichever was greater, or a wider area if approved by the DEQ Director.

A person who owned riparian property within a designated area could submit to the DEQ Director a request to conduct vegetation removal.

MCL 324.5202 et al.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill would necessitate the appropriation of up to $5.0 million for loans to property owners who wished to comply with a Compensatory Wetland Mitigation requirement by purchasing credits from a wetland mitigation bank.

Two pilot programs, one to help improve the efficiency with which the wetland permit application process is executed, and another to help local governments and other participating organizations develop wetland mitigation banks, would need to be funded.

The Department would have to develop and fund a distinct program to facilitate voluntary wetland restoration and conservation projects in coordination with Federal, State, tribal, and nongovernmental groups.

The bill would establish the Wetland Advisory Council. Associated costs would likely include the rent of a venue for the Council to meet, support staff costs, and other minor administrative costs. Council members would not receive compensation for serving on the Council.

Fiscal Analyst: Josh Sefton