

## WETLANDS PROGRAM CHANGES

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**Senate Bill 163 (Substitute H-3)**

**Sponsor: Sen. Mike Green**

**House Committee: Natural Resources**

**Senate Committee: Natural Resources, Environment, and Great Lakes**

**Complete to 6-12-13**

## A SUMMARY OF SENATE BILL 163 AS REPORTED FROM COMMITTEE 6-6-13

Senate Bill 163 (H-3) would make changes to Michigan's wetlands program under Parts 301 and 303 of the Natural Resources and Environmental Protection Act, including:

- Limiting the DEQ's powers and functions exercised under Parts 301 and 303 as a result of the department's federally delegated wetlands authority to only apply to "navigable waters" and "waters of the United States." Any determination of whether additional regulation is needed to protect the state's waters beyond the scope of federal law would be the responsibility of the Legislature.
- Clarifying that drain and agricultural drain maintenance activities do not require a permit under Part 301.
- Clarifying and expanding existing exemptions from needing Part 303 permits for ongoing agricultural operations, maintenance of agricultural drains, grazing of livestock, and the maintenance and installation of utility lines, among others.
- Altering the process by which the DEQ determines if feasible and prudent alternatives exist when deciding whether to issue a Part 303 permit to undertake activity in a wetland.
- Altering the process by which the DEQ requires compensatory wetland mitigation and requiring the department to establish a wetland mitigation bank funding program.
- Requiring the DEQ to establish a new general permit for blueberry farming in wetlands and to develop a blueberry production assistance program for the farming of blueberries in wetlands.
- Altering the application fee for minor project category permits and general permits under Parts 301, 303, and 325; minor project category permits would be set at \$100 and general permit application fees would be set at \$50.

A detailed breakdown of the changes pertaining to each Part follows below.

## **FISCAL IMPACT:**

Senate Bill 163 (H-3) would increase the amount of a permit fee for minor projects under Part 301 (Inland Lakes), Part 303 (Wetlands Protection), and Part 325 (Great Lakes Submerged Lands). The current minor project fee of \$50 would be increased to \$100 in these programs. Under the bill's provisions, general permit fees under Part 301 would remain at \$50, but general permit fees for Part 303 and 325 would be reduced from \$100 to \$50.

In FY 2012, the fees for wetlands permits generated \$1.4 million in revenue. According to the Department, the relevant programs would generate approximately the same amount of revenue with the changes in fees under Senate Bill 163 (H-3). Thus, the bill's provisions would have no significant fiscal impact to the Department.

While the bill would also increase administrative costs to the Department through requirements such as the development of a blueberry production assistance program, administrative rules revisions, and new general permit and minor project category permits, any increased costs are anticipated to be funded through existing DEQ resources.

## **DETAILED SUMMARY OF SENATE BILL 163 (H-3)**

### **Part 13 (Permits)**

#### **Application determination**

The bill would require the determination of an application to be in writing and be based on evidence that would meet the standards set forth in Section 75 of the Administrative Procedures Act. Additionally, the denial of an application would have to document that the determination (1) is based on sufficient facts or data, (2) is the product of reliable scientific principles and methods, and (3) has applied the principles and methods to the facts reliably.

### **Part 301 (Inland Lakes and Streams)**

#### **Scope of DEQ authority**

The bill would specify that for the purposes of Part 301, the powers, functions, and responsibilities exercised by the Department of Environmental Quality because of the state's permit program having federal approval only applies to "navigable waters" and "waters of the United States"; a determination of whether additional regulation is needed to protect the state's waters beyond the scope of federal law would be the responsibility of the Michigan Legislature.

#### **Exempt activities under Part 301**

##### **Maintenance of agricultural drain**

The bill would clarify that maintenance of an *agricultural drain* does not need a permit under Part 301 if (1) the maintenance includes only activities that maintain the location, depth, and bottom width of the drain as constructed or modified at any time before July 1,

2014, and (2) the maintenance is performed by the landowner as specified in the Michigan Drain Code.

"*Agricultural drain*" would mean a human made conveyance of water that (1) does not have continuous flow, (2) flows primarily because of precipitation-induced surface runoff or groundwater drainage, (3) serves agricultural production, and (4) was built before January 1, 1973, or was built in compliance with Part 301 or the former Public Act 203 of 1979.

#### Drain maintenance

Additionally, the bill would clarify that a Part 301 permit is not needed to maintain a drain that was legally established and built before January 1, 1973, or that was built or modified under a Part 301 permit.

"Maintenance of a drain" would mean the physical preservation of the location, depth, and bottom width of a drain and appurtenant structures to restore the function and approximate capacity of the drain as built or modified prior to July 1, 2014, and includes all of the following activities if performed under best management practices:

- Excavation of accumulated sediments back to original contours.
- Reshaping of the side slopes.
- Bank stabilization where reasonably necessary to prevent erosion.
- Armoring, lining, or piping if a previously armored, lined, or piped section is being repaired and all work takes place within the previous work's footprint.
- Replacement of existing control structures provided the original function remains unchanged and the original capacity has not increased.
- Repair of stabilization structures.
- Culvert replacement, including extensions up to 24 additional feet per culvert.
- Emergency reconstruction of recently damaged parts of a drain, which must occur within a reasonable period of time after damage occurs.

#### Additional exempted activities

The bill would also exempt the following activities under Part 301:

- Controlled access of livestock to streams for watering or crossing if constructed according to standards set forth by the United States Department of Agriculture.
- Temporary drawdowns of impoundments at hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC) and under FERC's authority if (1) the licensee consulted with the state and satisfied its concerns and (2) adverse environmental impacts have been avoided and minimized as is practical.

#### Permit application fees

The bill would increase from \$50 to \$100, the application fees for minor project permits under Part 301. Application fees for general permits would remain at \$50.

In the instance of the DEQ denying an application for a Part 301 permit, the department would be required to promptly refund the application fee.

### **Development of general permit**

The DEQ would be required by December 31, 2013, to establish a general permit for activities taking place in drains that are legally established under the Drain Code. The permit would be subject to all of the following:

- The permit must cover installation and replacement of culverts, clear span bridges, and end sections, culvert extensions, drain realignments, installation of bank stabilization structures and grade stabilization structures, spoil placement, and other common drain activities that meet best management practices.
- Allow a drain commissioner or drainage board to submit an application for authorization under the general permit on a countywide basis. The Michigan Department of Agriculture and Rural Development would be able to submit an application under the general permit on behalf of an intercounty drainage board on a drainage-district-wide basis.
- Require the DEQ to make a determination on a general permit application by March 1 if the drain commissioner or drainage board applies by the preceding January 20. Authorizations under a general permit would be valid until March 30 of the year after the year in which it was granted.
- Require the drain commissioner or drainage board to submit a report to the DEQ by December 31 of each year detailing the names of the drains on which activities were performed under the general permit during the calendar year, the locations and natures of the activity, and documentation that demonstrates the activities met the permit requirements.
- Prohibit a drain commissioner or drainage board from receiving new authorizations under a general permit if significant violations of the permit under a previous authorization granted to the drain commissioner or drainage board have not been corrected.

### **Part 303 (Wetlands Protection)**

#### **Acceptable uses not subject to permit**

##### **Grazing of livestock**

Part 303 contains a series of uses that are allowed in a wetland without a permit, including fishing, hunting, and trapping; swimming and boating; hiking; the grazing of animals; and farming, horticulture, silviculture, lumbering, and ranching activities. The bill would expand the accepted use of animal grazing to include fencing and posts if (1) the fence is designed to control livestock, (2) is no higher than 11 feet tall, (3) and uses an amount of material that does not exceed the amount of a woven wire fence utilizing 6-inch vertical spacing and posts.

#### Ongoing agricultural operation

As noted, farming, horticulture, silviculture, lumbering, and ranching activities are allowed in wetlands without needing a permit. Under the bill, beginning on October 1, 2013, in order to be allowed in a wetland without a permit, the activities would have to be part of an established ongoing farming, ranching, horticultural, or silvicultural operation. Farming and silvicultural activities on areas of unplanted land as part of a conventional rotational cycle would be considered part of an established ongoing operation, unless modifications to the hydrological regime or mechanized land clearing are required to resume operation. Activities that bring land into an accepted use that is not part of any of these uses, or that converts a forested or silvicultural area to farming, ranching, or horticultural uses would not be part of an established ongoing use.

Additionally, minor drainage would not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland, or conversion from one wetland use to another, and would specifically exclude the construction of a canal, ditch, dike, or other waterway or structure that drains or significantly modifies a stream, lake, or wetland.

#### Maintenance of agricultural drains

The bill would clarify that the maintenance of agricultural drains in a wetland, regardless of outlet, does not require a Part 303 permit if all of the following are met:

- The maintenance includes only activities that maintain the location, depth, and bottom width of the drain as built or modified at any time before July 1, 2014.
- The maintenance is performed by the landowner or as required by the Michigan Drain Code.
- The maintenance does not include any modification that would result in additional wetland drainage or conversion to a use to which it was not previously subject.

#### Maintenance of legally established drain

The maintenance of a legally established drain built prior to January 1, 1973, or under a Part 303 permit would not need a permit under Part 303.

#### Maintenance of public streets

The bill would clarify that maintenance of public streets that meets both of the following would not need a Part 303 permit:

- Does not include any modifications that change the original location or footprint.
- Maintenance is done in a manner that minimizes adverse effects on the wetland. The bill would remove a provision that excludes as maintenance, adding extra lanes, increasing the right-of-way, or deviating from the existing location of the roadway.

#### Maintenance of utility lines

The bill would clarify that maintenance or repair of utility lines and associated support structures that meet the following would not need a Part 303 permit:

- The maintenance is done in a manner that minimizes adverse effects on the wetland.
- The maintenance does not include any modification to the character, scope, or size of the originally built design.
- The maintenance does not convert a wetland area to a different use.

"Utility line" would mean any pipe or pipeline used for the transportation of any gaseous, liquid, liquescent, or slurry substance, and any cable, line, or wire for the transmission of electrical energy, telephone, or radio or television communication. [Part 303 currently contains separate exemptions for the maintenance of electric transmission lines and gas and oil pipelines. The bill would combine those two exemptions into this new exemption under the maintenance of utility lines.]

#### Installation of utility lines

The bill would exempt the installation of utility lines with a diameter under six inches using directional drilling or boring, or knifing-in, and the placement of poles with minimal structure support, as long as the lines and poles are installed in a manner that minimizes adverse effects on the wetland.

#### Iron and copper mining

The bill would remove the exemption from Part 303 permitting for the construction of iron and copper mining tailings basins and water storage areas.

#### Placement of biological residuals

The bill would exempt the placement of biological residuals from activities, including the cutting of woody vegetation or the in-place grinding of tree stumps, performed in a wetland as long as all of the residuals originated within the wetland.

#### **Incidentally created wetland exemptions**

Wetlands that are incidentally created as a result of certain activity are exempt from regulation under Part 303. The bill clarifies the exemption for the excavation of minerals would also extend to gravel mining and the exemption from regulation would apply until the property on which the wetland is located (1) is no longer used for excavation as part of a commercial sand, gravel, or mineral mining operation, and (2) is being used for another purpose not related to excavation as part of a commercial sand, gravel, or mineral mining operation.

The bill would also expand the number of activities exempted under Part 303 that incidentally create a wetland to include the following:

- Drain construction in upland for the purpose of removing excess soil moisture from upland areas primarily in agricultural use.

- Roadside ditch construction in upland for the purpose of removing excess soil moisture.
- Agricultural, soil and water conservation practices that are designed, constructed, and maintained to enhance water quality.

### **Contiguous water bodies**

The bill would exempt areas that become contiguous to water bodies created by commercial excavation of sand, gravel, or mineral mining from regulation under Part 303 based solely on the reason that it is contiguous to the newly created water body. The exemption would remain in effect until the property containing the wetland (1) is no longer used for excavation as part of a commercial sand, gravel, or mineral mining operation, and (2) is being used for another purpose unrelated to excavation.

### **Permit fees**

The bill would reduce the application fee for Part 303 general permits from \$100 to \$50. Application fees for Part 303 minor project permits would increase from \$50 to \$100.

The DEQ would be required to refund any application fees paid if it denied an application for a Part 303 permit.

### **Conditional permit**

The bill would allow the DEQ to issue a conditional permit prior to the expiration of the 20-day period allowed for individuals to request a public hearing on the issuance of a permit if emergency conditions warrant a Part 303 project to protect property of the public health, safety, or welfare.

### **Pre-application meeting**

Part 303 allows landowners to request pre-application meetings, for a fee, with the DEQ to discuss proposed projects or permit applications in their entirety. Currently, there is no fee for pre-application meetings related to cranberry production activities and the fee exemption expired on October 1, 2012. The bill would remove the October 1, 2012, expiration and extend the no-cost pre-application meeting opportunity for blueberry production activities. The bill would also eliminate a provision that would automatically repeal Section 30306b on October 1, 2015; Section 30306b provides for the opportunity to request pre-application meetings.

### **Feasible and prudent alternatives**

Currently, in considering a permit application, the DEQ can consider whether a feasible and prudent alternative exists before granting a permit to undertake activity in a wetland, including considering property that is not presently owned by the applicant if it can be reasonably obtained and utilized in a way that fulfills the basic purpose of the proposed activity. Under the bill, applicants would have a rebuttable presumption that alternatives located on land they do not presently own are not feasible and prudent if all the following are met:



- The activity involves placing fill material in a wetland, or dredging or removing soil or minerals from a wetland.
- The activity will not affect more than two acres of wetland.
- The activity is for the construction or expansion of a single-family home and attendant features, the construction or expansion of a barn or farm building, or the expansion of a small business facility.
- The activity is not covered under a general permit.

Consideration of feasible and prudent alternatives regarding the size of a proposed building would have to be based on the building's footprint and not its square footage. Additionally, the choice of and extent of the proposed activity within a proposed building could not be considered in determining feasible and prudent alternatives.

### **Compensatory wetland mitigation**

Currently, Part 303 allows the DEQ to require compensatory wetland mitigation for projects that would adversely impact wetlands. Under the bill, in determining the mitigation ratio, the DEQ would have to consider the following:

- The method of compensatory mitigation.
- The likelihood of success.
- Differences between the functions lost at the impacted wetland site and the functions expected to be produced by the mitigation project.
- Temporary losses of aquatic resource functions.
- Difficulty of restoring or establishing the desired aquatic resource type and functions.
- Distance between the affected aquatic resource and the mitigation site.

Permit applications for agricultural activities could provide for the protection and restoration of the impacted wetland site under a conservation easement with the DEQ as part of the applicant's mitigation requirements. Additionally, the applicant could make a payment into the stewardship fund, if created, instead of providing financial assurances to the DEQ that mitigation activities will be accomplished as specified.

### **Stewardship fund**

The DEQ would be permitted to establish a stewardship fund to develop mitigation for impacted sites or as an alternative to any financial assurances required to be paid by applicants. The State Treasurer would direct the investment of the fund and any interest and earnings from investments would be credited to the fund. Money in the fund at the close of the fiscal year would remain in the fund and would not lapse to the General Fund.

### **Revised rules on mitigation**

Within one year after the bill takes effect, the DEQ would be required to submit to the Office of Regulatory Reinvention (ORR) for informal review, revised rules on mitigation that do the following:



- Reduce the preference for on-site mitigation.
- Allow flexibility in mitigation ratios for uses of wetlands.
- Allow mitigation ratios to be reduced when approved credits from a mitigation bank are used.
- Allow consideration of additional ecologically beneficial features
- Allow excess mitigation for any project to be credited to another project.

The DEQ would have to submit revised rules that encourage the development of wetland mitigation banks to the ORR within one year of the bill taking effect that do the following:

- Expand mitigation bank service areas.
- Allow earlier release of credits if the benefits have been properly established and are revocable or covered by a financial assurance.
- Allow wetland preservation to be used in areas where restoration opportunities do not exist, if an unacceptable disruption of the aquatic resources would not result.

#### **Wetland mitigation bank**

The DEQ would be required to establish a wetland mitigation bank funding program under Part 52 to provide grants and loans to eligible municipalities to help them establish mitigation banks.

#### **New general permit**

The bill would allow the DEQ to develop and maintain new general permit and minor project categories that are consistent with nationwide permits. Additionally, the department would be able to alter the scope of activities covered under a general permit or minor project categories corresponding to nationwide permits if any adverse environmental effects would be minimal.

#### **General permit for blueberry farming**

By October 1, 2013, the DEQ would be required to develop and maintain a general permit for alteration of a wetland for the purposes of blueberry farming that includes minimal drainage and earth moving if all of the following are met:

- The wetland will be restored once blueberry farming activities in the wetland have ended.
- The farmed wetland is placed under conservation easement protection until the wetland is restored when blueberry farming activities have ended.

- Activities that convert the wetland to a non-wetland are prohibited.
- Roads, ditches, reservoirs, pump houses, and secondary support facilities for shipping, storage, packaging, parking, and similar purposes are prohibited unless specifically authorized under Section 30305.

By December 31, 2013, the DEQ would be required to propose new general permit or minor project categories for the conversion of wetlands to blueberry farming or other agriculture that includes more than minimal drainage or earth moving.

#### **Blueberry production assistance program**

The DEQ would be required to develop a blueberry production assistance program to provide wetland delineation and pre-application services and assistance with avoidance and minimization. The program would be coordinated with the Department of Agriculture and Rural Development, and the DEQ would be required to provide education and outreach services on wetland regulations and agricultural activities and help interested parties with the development of wetland mitigation banks to provide compensatory mitigation for agricultural impacts.

#### **Landowner assessment of wetland**

Currently, under Part 303, a landowner can request the DEQ to assess whether a parcel of property or portion of the parcel is wetland. The bill would specify that a wetland would not be contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream, if the DEQ determines there is no direct physical contact and no surface water or interflowing groundwater connection. As part of an assessment, a person could request the DEQ to make a determination whether a wetland is not contiguous; such a determination would have to be made in writing within 30 days of an on-site evaluation.

The DEQ would be prohibited from considering an agricultural drain in determining whether a wetland is contiguous to the Great Lakes, Lake St. Clair, or an inland lake or stream. A drainage structure would not be considered a wetland, and a temporary obstruction of drainage, in and of itself, would not be sufficient to be classified as wetland until the water was of sufficient frequency and duration to be identified as a wetland under Part 303.

Under Part 303, the DEQ can charge landowners a fee to perform an assessment based on the cost of conducting such an assessment. The bill would prohibit the DEQ from charging a fee for an assessment under the blueberry production assistance program and require the department to provide copies of any delineation forms completed as part of a permit application, upon the request of an applicant.

#### **Scope of DEQ authority**

The bill would specify that for the purposes of Part 303, the powers, functions, and responsibilities exercised by the DEQ because of the state's permit program having federal approval, only applies to "navigable waters" and "waters of the United States"; a

determination of whether additional regulation is needed to protect the state's waters beyond the scope of federal law would be the responsibility of the Michigan Legislature.

### **Part 325 (Great Lakes Submerged Lands)**

#### **Permit fees**

The bill would reduce the application fee for Part 325 general permits from \$100 to \$50. Application fees for Part 325 minor project categories would be increased from \$50 to \$100.

#### **Enacting Section 1**

The bill would repeal Section 30325, which requires the DEQ to pursue an agreement with the U.S. Environmental Protection Agency to expand the categories of discharges that are subject to the waiver from the requirements of certain sections of the federal Water Pollution Control Act.

### **POSITIONS:**

Michigan Department of Environmental Quality supports the bill. (6-6-13)

American Transmission Company supports the bill. (6-4-13)

Cliffs Natural Resources supports the bill. (6-6-13)

Consumers Energy supports the bill. (6-6-13)

County Road Association of Michigan supports the bill. (6-4-13)

Detroit Regional Chamber supports the bill. (6-4-13)

DTE Energy supports the bill. (6-6-13)

Hub Farms supports the bill. (6-6-13)

Hudbay Minerals supports the bill. (6-4-13)

Indian Fields, Inc. supports the bill. (6-6-13)

Indiana-Michigan Power supports the bill. (6-6-13)

Kingstreet Dairy Farm supports the bill. (6-6-13)

Michigan Aggregate Association supports the bill. (6-4-13)

Michigan Agri-Business Association supports the bill. (6-6-13)

Michigan Allied Poultry Industry supports the bill. (6-6-13)

Michigan Association of Conservation Districts supports the bill. (6-4-13)

Michigan Association of County Drain Commissioners supports the bill. (6-4-13)

Michigan Association of Home Builders supports the bill. (6-6-13)

Michigan Association of Realtors supports the bill. (6-6-13)

Michigan Chamber of Commerce supports the bill. (6-4-13)

Michigan Farm Bureau supports the bill. (6-6-13)

Michigan Floriculture Growers Council supports the bill. (6-6-13)

Michigan Forest Products Council supports the bill. (6-4-13)

Michigan Manufacturers Association supports the bill. (6-6-13)

Michigan Soybean Association supports the bill. (6-6-13)

Orvana Resources supports the bill. (6-4-13)

Plum Creek Timber supports the bill. (6-4-13)

Potato Growers of Michigan supports the bill. (6-6-13)

Rio Tinto Eagle Mine supports the bill. (6-4-13)

West Michigan Farm Bureau supports the bill. (6-6-13)

WE Energies supports the bill. (6-6-13)

Zelinko Brothers supports the bill. (6-6-13)

Cook Brothers Farms opposes the bill. (6-6-13)

Heffron Farms and Markets opposes the bill. (6-6-13)

League of Women Voters opposes the bill. (6-4-13)

Michigan Environmental Council opposes the bill. (6-4-13)

Michigan Land Improvement Association opposes the bill. (6-4-13)

Michigan League of Conservation Voters opposes the bill. (6-6-13)

S. Hecksel Farms, LLC opposes the bill. (6-6-13)

Sierra Club opposes the bill. (6-4-13)

Sowerby Farms opposes the bill. (6-4-13)

Three Morrison's Inc. opposes the bill. (6-6-13)

Tip of the Mitt Watershed Council opposes the bill. (6-4-13)

Legislative Analyst: Jeff Stoutenburg  
Fiscal Analyst: Viola Bay Wild

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.