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BILL



ANALYSIS

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Senate Bill 163 (as enacted)

PUBLIC ACT 98 of 2013

Sponsor: Senator Mike Green

Senate Committee: Natural Resources, Environment and Great Lakes

House Committee: Natural Resources

Date Completed: 2-6-15

CONTENT

The bill amended Parts 13 (Permits), 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 the following:

- **Require the Department of Environmental Quality's (DEQ's) decision on a permit application to be based upon evidence that would meet the statutory standards for a contested case.**
- **Revise the standards used by the DEQ to deny a permit, and extend them to any review upholding the Department's decision.**
- **Revise a number of exceptions to the requirement for a permit under Parts 301 and 303.**
- **Revise exemptions from regulation under Part 303.**
- **Revise the application fees for several permit categories under Parts 301, 303, and 325.**
- **Require the DEQ promptly to refund the fee if it denies an application under Part 301 or 303.**
- **Require the DEQ to develop a general permit under Part 301 for legally established drains.**
- **Allow a drain commissioner or drainage board to apply for authorization under the general permit on a countywide basis every year, and allow the Michigan Department of Agriculture and Rural Development to apply on behalf of an intercounty drainage board on a drainage-district-wide basis.**
- **Authorize the DEQ to issue a conditional permit under Part 303 before the expiration of a 20-day period during which a person may request a hearing on the application, if emergency conditions warrant a project.**
- **Eliminate the October 1, 2015, sunset on provisions regarding a preapplication meeting under Part 303.**
- **Establish in Part 303 a rebuttable presumption with regard to the availability of feasible and prudent alternatives, and prescribe the conditions that may be considered in determining such alternatives.**
- **Prescribe factors the DEQ must consider in imposing wetland mitigation requirements.**
- **Authorize the DEQ to establish a stewardship fund to develop wetland mitigation at particular sites or provide an alternative to financial assurance required for mitigation projects.**
- **Require the DEQ to submit to the Office of Regulatory Reinvention revised administrative rules pertaining to wetland mitigation banking.**
- **Require the DEQ to establish a program to provide grants and loans to eligible municipalities for the creation of wetland mitigation banks.**
- **Authorize the DEQ to develop and maintain new general permit and minor project categories consistent with nationwide permits.**

- **Require the DEQ to develop under Part 303 a general permit for alteration of wetland for blueberry farming under certain conditions.**
- **Require the DEQ to propose new general permits or minor project categories under Part 303 for conversion of wetland to blueberry farming or other agriculture that includes more than minimal drainage or earth moving.**
- **Require the DEQ to develop a blueberry production assistance program.**
- **Require the DEQ to provide education and outreach on wetland regulations and agricultural activities, and assist interested parties with the development of wetland mitigation banks.**
- **Prescribe criteria to be considered in the DEQ's identification of a wetland and determination of its contiguity to a body of water.**

The bill also provides that the DEQ's powers, duties, functions, and responsibilities resulting from Federal approval of Michigan's permit program under the Federal Water Pollution Control Act apply only to "navigable waters" and "waters of the United States", and that determining the need for regulation beyond the scope of Federal law is the responsibility of the Michigan Legislature.

In addition, the bill repealed a section of Part 303 pertaining to a waiver of certain Federal requirements regarding the State's permit program for the discharge of dredged or fill material into navigable waters. The bill also provides for the repeal of Part 303 in the event that the U.S. Environmental Protection Agency (EPA) withdraws its approval of the State's program.

The bill took effect on July 2, 2013.

Part 13: Permits

Part 13 establishes processing periods for the different permits issued under NREPA. The DEQ must approve or deny an application for a permit by the prescribed deadline. If requested by the applicant, the Department must extend the processing period by up to 120 days, and may extend the period by up to one year.

Under the bill, the approval or denial of a permit application must be in writing, and must be based on evidence that would meet the standards in Section 75 of the Administrative Procedures Act.

(Under that section, in a contested case, the rules of evidence as applied in a nonjury civil case in circuit court must be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied on by reasonably prudent people in the conduct of their affairs. Effect must be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and must be noted in the record. Subject to these requirements, an agency may provide in a contested case or by rule for submission of all or part of the evidence in written form, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced.)

Previously, Part 13 required the DEQ, to the extent practical, to specify all of the reasons for a permit denial, including the provisions of NREPA or rules promulgated under it, and, to the extent applicable, the scientific information providing the basis for the denial. Under the bill, instead, a permit denial and any review upholding the DEQ's decision must determine, to the extent practical, all of the following:

- That the decision is based on specific provisions of NREPA or rules promulgated under it.
- That the decision is based on sufficient facts or data, which were recorded in the file.
- To the extent applicable, that the decision is the product of reliable scientific principles and methods and has applied them reliably to the facts.

Part 301: Inland Lakes & Streams

Scope of Regulation. The bill specifies that, for the purposes of Part 301, the powers, duties, functions, and responsibilities exercised by the DEQ because of Federal approval of Michigan's permit program under Section 404(g) and (h) of the Federal Water Pollution Control Act (FWPCA) apply only to "navigable waters" and "waters of the United States" as defined under Section 502(7) of that Act, and as further refined by federally promulgated rules and court decisions that have the full effect and force of Federal law. The bill provides that determining whether additional regulation is necessary to protect Michigan waters beyond the scope of Federal law is the Legislature's responsibility based on its determination of what is in the best interest of Michigan citizens.

(The FWPCA allows the Secretary of the Army to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. Under Section 404(g), the governor of any state desiring to administer its own permit program within its jurisdiction may submit a proposal to the Administrator of the Environmental Protection Agency. Under Section 404(h), upon approval of a proposal, the Secretary of the Army must suspend the issuance, administration, and enforcement of permits for activities covered by the state's program.

Section 502(7) of the FWPCA defines "navigable waters" as the waters of the United States, including the territorial seas.)

Exemption from Permit Requirement. Part 301 requires a person to obtain a permit from the DEQ in order to do any of the following:

- Dredge or fill bottomland.
- Construct, enlarge, extend, remove, or place a structure on bottomland.
- Construct, reconfigure, or expand 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 waterway where the purpose is ultimate connection with an existing inland lake or stream, or within 500 feet of the ordinary high-water mark of an existing inland lake or stream.
- Connect any natural or artificially constructed waterway with an existing inland lake or stream for navigation or any other purpose.

Part 301 contains several exceptions to the permit requirement, which, under the previous language, included construction or maintenance of a private agricultural drain, regardless of outlet. The bill, instead, makes an exception for maintenance of an agricultural drain, regardless of outlet, if both of the following requirements are met:

- The maintenance includes only activities that maintain the as-constructed location, depth, and bottom width of the drain as constructed or modified at any time before of July 1, 2014.
- The maintenance is performed by the landowner or pursuant to the Drain Code.

Under the bill, as used in Part 301, "agricultural drain" means a human-made conveyance of water that meets all of the following:

- Does not have continuous flow.
- Flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage systems.
- Serves agricultural production.
- Was constructed before January 1, 1973, or was constructed in compliance with Part 301 or former Public Act 203 of 1979 (the Goemaere-Anderson Wetland Protection Act).

The bill also revised an exemption from the permit requirement for certain waste collection or treatment facilities. Previously, this exemption referred to a waste collection or treatment facility that was ordered to be constructed or approved for construction by the DEQ. The bill refers to

such a facility that is ordered to be constructed or approved for construction under State or Federal water pollution control law, if constructed in upland.

Part 301 also exempted maintenance and improvement of a drain that was legally established or constructed before January 1, 1973, pursuant to the Drain Code. The bill eliminated the reference to drain improvement and extended the exception to maintenance of a drain constructed or modified under a Part 301 permit.

With regard to these provisions, the bill defines "maintenance of a drain" as 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 constructed or modified at any time before July 1, 2014. The term includes activities specified in the bill if performed with best management practices.

Permit Application Fees. An application for a permit under Part 301 must be accompanied by a fee based on an administrative cost according to a prescribed schedule, depending on the type of project. For activities included in a minor project category, the bill increased the fee from \$50 to \$100. (Part 301 authorizes the DEQ to establish minor project categories of activities and projects that are similar in nature, have minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.) The bill retained the \$50 fee for activities included in a general permit category.

The bill requires the DEQ, if it denies an application for a permit under Part 301, to refund the application fee promptly.

General Permit for Drains. By December 31, 2013, the bill required the DEQ to develop and maintain a general permit for activities in drains legally established pursuant to the Drain Code. The general 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 use best management practices.

A drain commissioner or drainage board may apply for an authorization under the general permit on a countywide basis. The Michigan Department of Agriculture and Rural Development may apply for an authorization under the general permit on behalf of an intercounty drainage board on a drainage-district-wide basis.

The DEQ must grant or deny an authorization under the general permit by March 1 if the commissioner or board applies by the preceding January 20. An authorization under the general permit is valid until March 30 of the year after the year in which it is granted.

By December 31 of each year, the commissioner or board must submit to the DEQ a report that includes the names of the drains on which activities were performed under the permit during that calendar year, the locations and nature of the activities, and plans and other documentation demonstrating that the activities met the general permit requirements.

The bill provides that a drain commissioner or drainage board is not eligible for a new authorization under the general permit if significant violations under a previous authorization have not been corrected.

Part 303: Wetlands Protection

Exemption from Permit Requirement. Part 303 requires a person to obtain a permit from the DEQ to do any of the following in a wetland:

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

Specific uses are allowed without a permit, however, subject to other Michigan laws and the owner's regulation. These uses include grazing of animals. The bill specifies that this includes fencing and post placement if the fence is designed to control livestock, does not exceed 11 feet in height, and uses an amount of material that does not exceed that of a woven wire fence using six-inch vertical spacing and posts.

The uses allowed without a permit also include farming, horticulture, silviculture, lumbering, and ranching activities, including plowing, irrigation, irrigation ditching, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, and upland soil and water conservation practices.

The bill provides that, beginning October 1, 2013, to be allowed in a wetland without a permit, these activities must be part of an established ongoing farming, horticultural, silvicultural, or ranching operation. Farming and silvicultural activities on areas lying fallow as part of a conventional rotational cycle are considered part of an established ongoing operation, unless modifications to the hydrological regime or ongoing mechanized land clearing are necessary to resume operation.

Activities that bring an area into farming, horticultural, silvicultural, or ranching use, or that convert an area from a forested or silvicultural use to a farming, ranching, or horticultural use, are not considered part of an established ongoing operation.

The bill specifies that minor drainage does not include drainage associated with the immediate or gradual conversion of a wetland to a nonwetland, or conversion from one wetland use to another. Minor drainage also excludes the construction of a canal, ditch, dike, or other waterway or structure that drains or otherwise significantly modifies a stream, lake, or wetland.

The bill also revised an exemption from the permit requirement for maintenance, operation, or improvement that included straightening, widening, or deepening of the following that was necessary for the production or harvesting of agricultural products:

- An existing private agricultural drain.
- The portion of a drain legally established pursuant to the Drain Code that was constructed or improved for drainage purposes.
- A drain constructed pursuant to other provisions of Part 303 or former Public Act 203 of 1979.

The bill, instead, exempts from the permit requirement maintenance of an agricultural drain, regardless of outlet, if the following requirements are met:

- 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.
- The maintenance is performed by the landowner or pursuant to the Drain Code.
- The maintenance does not include any modification that results in additional wetland drainage or conversion of a wetland to a use to which it was not previously subject.

As used in Part 303, "agricultural drain" has the same definition as in Part 301.

The bill also exempts maintenance of a drain that was legally established pursuant to the Drain Code, if it were constructed before January 1, 1973, or under a Part 303 permit. With regard to this provision, "maintenance of a drain" means 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 constructed or modified at any time before July 1, 2014, including the placement of spoils removed from a drain in locations where spoils have been placed along it previously. Maintenance does not include any modification that results in additional wetland drainage or conversion of wetland to a use to which it was not previously subject.

In addition, Part 303 contained an exception to the permit requirement for drainage necessary for the production and harvesting of agricultural products if the wetland was owned by a person who was engaged in commercial farming. The bill deleted this exception.

Previously, Part 303 also exempted maintenance or improvement of public streets, highways, or roads done within the right-of-way and in a manner that minimized adverse effect on the wetland. The bill, instead, exempts maintenance of public streets, highways, or roads if it does not include any modification that changes the original location or footprint, and is done in a manner that minimizes any adverse effect on the wetland.

The bill deleted a provision under which a permit was not required for maintenance, repair, or operation of gas or oil pipelines, or construction of gas or oil pipelines with a maximum diameter of six inches, if the pipelines were constructed, maintained, or repaired in a manner that minimized any adverse effect on the wetland.

Under the bill, a permit is not required for the maintenance or repair of utility lines and associated support structures that is done in a manner that minimizes any adverse effect on the wetland; does not include any modification to the character, scope, or size of the originally constructed design; and does not convert a wetland area to a use to which it was not previously subject.

The bill also deleted a provision under which maintenance, repair, or operation of electric transmission and distribution power lines and construction of distribution power lines were allowed in a wetland without a permit, if the distribution lines were constructed, maintained, or repaired in a manner that minimized any adverse effect on the wetland. Instead, the bill exempts the installation of utility lines with a maximum diameter of six inches using directional drilling or boring, or knifing-in, and the placement of poles with minimal (less than one cubic yard) structure support, if the lines and poles are installed in a manner that minimizes any adverse effect. Specific additional requirements apply to directional drilling or boring.

For the purposes of these provisions, the bill defines "utility line" as any pipe or pipeline used for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purposes; and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone or telegraph messages, or radio or television communication.

The bill also eliminated an exception to the permit requirement for the construction of iron and copper mining tailings basins and water storage areas.

The bill exempts from the permit requirement the placement of biological residuals from activities, including the cutting of woody vegetation or the in-place grinding of tree stumps, performed within a wetland, if all of the residuals originate within that wetland.

Exemption from Part 303 Regulation. A wetland created incidentally as a result of certain activities is not subject to regulation under Part 303. The activities include excavation for mineral or sand mining, if the area was not a wetland before excavation. The bill refers to excavation as part of commercial sand, gravel, or mineral mining. Previously, this exemption did not include a wetland on or adjacent to a water body of at least one acre. The bill deleted this provision. Also, the bill provides that the exemption applies until the property on which the wetland is located is no longer used for excavation as part of commercial mining, and is being used for a purpose unrelated to the excavation.

Under the bill, construction and operation of a water treatment pond, lagoon, or storm water facility in compliance with State or Federal water pollution control laws also are exempt from regulation under Part 303. Previously, Part 303 contained this exemption but referred to regulations rather than laws, and did not include storm water facilities.

The bill also exempts the following from Part 303 regulation:

- The construction of drains in upland for the sole purpose of removing excess soil moisture from upland areas that are primarily in agricultural use.
- The construction of roadside ditches in upland for the sole purpose of removing excess soil moisture from upland.
- An agricultural soil and water conservation practice designed, constructed, and maintained for the purpose of enhancing water quality.

The bill specifies that an area that becomes contiguous to a water body created as a result of commercial excavation for sand, gravel, or mineral mining is not subject to Part 303 regulation solely because it is contiguous to the water body. This exemption applies until the property is no longer used for excavation and is being used for an unrelated purpose.

Permit Fee. An application for a Part 303 permit must be accompanied by a fee. Previously, for a project in a category of activities for which a general permit was issued, the fee was \$100. The bill reduced the fee to \$50. The bill establishes a fee of \$100 for activities included in a minor project category.

The bill requires the DEQ promptly to refund the fee if it denies an application for a permit.

Conditional Permit. Part 303 allows the DEQ to hold a public hearing on a permit application, and to approve or disapprove an application without a hearing unless a person requests one within 20 days after notice of the application is mailed, or unless the Department determines that the impact of the application warrants a hearing.

The bill authorizes the DEQ to issue a conditional permit before the 20-day period expires if emergency conditions warrant a project to protect property or the public health, safety, or welfare.

Preapplication Meeting. Under Part 303, a landowner or other authorized person may request a meeting with the DEQ to review a proposed project or proposed permit application in its entirety. Any written agreement provided by the DEQ as a result of a preapplication meeting regarding the need to obtain a permit is binding on the Department for two years.

A request for a preapplication meeting must be accompanied by a fee ranging from \$150 to \$1,000, depending on where the meeting is held and the size of the project area. If the project location is a single-family residential lot of less than one acre, however, there is no fee for a meeting at the DEQ's district office and the fee for a meeting at the project site is \$100.

Until October 1, 2012, there was no fee for a preapplication meeting for cranberry production activities, regardless of the meeting's location. The bill reinstated this fee exemption, and extended it to blueberry production.

Previously, all of the provisions regarding preapplication meetings were set to expire on October 1, 2015. The bill eliminated the sunset.

Feasible & Prudent Alternatives. 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, a permit may not be approved for any of the following activities in a wetland:

- Depositing or permitting the placing of fill material.
- Dredging, removing, or permitting the removal of soil or minerals.
- Constructing, operating, or maintaining any use or development.
- Draining surface water.

Part 303 prescribes factors that the DEQ must consider in determining whether the activity is in the public interest, including the availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

If it is otherwise a feasible and prudent alternative, a property not presently owned by the applicant that could reasonably be obtained, used, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered. The bill establishes a rebuttable presumption that alternatives located on property not presently owned by the applicant are not feasible and prudent, if all of the following conditions are met:

- The activity involves depositing or permitting the placing of fill material; or dredging, removing, or permitting the removal of soil or minerals.
- The activity will affect a maximum of two acres of wetland.
- The activity is undertaken for the construction or expansion of a single-family home and attendant features, the construction or expansion of a barn or other farm building, or the expansion of a small business facility.
- The activity is not covered by a general permit.

The bill requires consideration of feasible and prudent alternatives regarding the size of a proposed structure to be based on the structure's footprint and not its square footage. The choice and extent of the proposed activity within a proposed structure may not be considered.

Compensatory Wetland Mitigation. Part 303 allows the DEQ to impose as a condition on any permit, other than a general permit, a requirement for compensatory wetland mitigation through one or more prescribed methods. If mitigation is required, a permit applicant must submit a mitigation plan to the Department for approval, and provide for permanent protection of the mitigation site. The Department may require financial assurance to assure that mitigation is accomplished as specified.

Under the bill, if mitigation is required, in setting the mitigation ratio the DEQ must consider the mitigation method, the likelihood of success, differences between the functions lost at the affected site and the functions expected to be produced by the mitigation project, temporary losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and the distance between the affected resource and the mitigation site.

For agricultural activities, the bill allows a permit applicant to provide for protection and restoration of the affected site under a conservation easement with the DEQ as part of the mitigation requirements. As an alternative to providing required financial assurances, an applicant may make a payment into the stewardship fund (described below), if established, as part of the requirements.

The bill authorizes the DEQ to establish a stewardship fund within the State Treasury. The State Treasurer may receive money or other assets from any source for deposit into the fund. The Treasurer must direct the investment of the fund, and credit to it any interest and earnings. Money in the fund at the close of the fiscal year will remain in the fund and will not lapse to the General Fund. The DEQ is the fund administrator for auditing purposes. The Department may spend fund money, upon appropriation, only to develop mitigation for affected sites or as an alternative to the required financial assurance.

By July 2, 2014, the DEQ had to submit to the Office of Regulatory Reinvention (ORR) for informal review revised administrative rules on mitigation that do all of the following:

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

The DEQ also had to submit to the ORR, by July 2, 2014, revised rules that encourage the development of wetland mitigation banks. The rules must do the following:

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

A service area must be located within the same watershed or ecoregion as the permitted project or activity, ensure no net loss of the wetland resources, and protect the predominant wetland functions of the service area. The DEQ must consider enlarging the size of ecoregions for mitigation bank service areas.

The bill requires the Department to establish a wetland mitigation bank funding program under Part 52 (Strategic Water Quality Initiatives) that provides grants and loans to eligible municipalities for the purposes of establishing mitigation banks.

(Under Part 52, the purposes for which money in the Strategic Water Quality Initiatives Fund may be used include grants and loans for wetland mitigation banks, and the DEQ must establish a funding program that provides up to \$10.0 million in grants and loans to eligible municipalities. Up to half of that amount may be used for grants, which municipalities may use to complete loan application requirements related to wetland mitigation banking. Grants may cover up to 90% of a municipality's costs. Municipalities may use loans under the program to establish wetland mitigation banks.)

Permit Coordination. The DEQ is required to coordinate general permit and minor project categories under Parts 303, 301, and 325 consistent with nationwide permits, as appropriate. The bill also allows the Department to develop and maintain new general permit and minor project categories. In addition, the Department may alter the scope of the activities covered under general permit and minor project categories corresponding to nationwide permits if any adverse environmental effects will be minimal.

Blueberry Farming Permits & Project Categories. The bill required the DEQ, by October 1, 2013, to develop and maintain a general permit for alteration of wetland for blueberry farming that includes minimal drainage and earth moving if all of the following requirements are met:

- The wetland will be restored when farming activities in the wetland cease.
- The farmed wetland is placed under conservation easement protection until the wetland is restored when farming activities cease.
- Activities that convert the wetland to a nonwetland are prohibited.

Also, roads, ditches, reservoirs, pump houses, and secondary support facilities for shipping, storage, packaging, parking, and similar purposes must be prohibited unless authorized under Section 30305 (which exempts certain activities and uses from the permit requirement or regulation).

The bill also required the DEQ, by December 31, 2013, to propose new general permits or minor project categories for conversion of wetland to blueberry farming or other agriculture that includes more than minimal drainage or earth moving.

Assistance Programs. The bill requires the DEQ to develop a blueberry production assistance program to provide wetland delineation and preapplication services and assistance with avoidance and minimization. The Department must coordinate this program with the Michigan Department of Agriculture and Rural Development. The DEQ also must provide education and outreach on wetland regulations and agricultural activities, and assist interested parties with the development of wetland mitigation banks for the purpose of providing required compensatory mitigation for agricultural impacts.

Assessment of Wetland. Part 303 allows a person who owns or leases a parcel of property to request the DEQ to assess whether that parcel is a wetland and give the property owner a written assessment report.

Part 303 defines "wetland" as 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 or Lake St. Clair, an inland lake or pond; 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 natural resources from pollution, impairment, or destruction and has notified the owner.

Under the bill, as part of an assessment, a person may request that the Department make a determination whether a wetland is not contiguous. The bill provides that a wetland is not contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream, if the DEQ determines that there is no direct physical contact and no surface water or interflowing groundwater connection to such a body of water. The Department must make its determination in writing within 30 days after an on-site evaluation. The Department may not consider an agricultural drain in determining whether a wetland is contiguous to any of the specified bodies of water.

The bill provides that a drainage structure, such a culvert, ditch, or channel, in and of itself, is not a wetland. A temporary obstruction of drainage, in and of itself, is not a wetland until the presence of water is of sufficient frequency and duration to be identified as wetland pursuant to Section 30301(2). (That section requires the DEQ and local units of government, in identifying wetland boundaries, to apply the technical wetland delineation standards set forth in the United States Army Corps of Engineers January 1987 wetland delineation manual and appropriate regional supplements.)

Part 303 allows the DEQ to charge a fee for an assessment based on the cost of conducting it. The bill prohibits imposition of a fee for an assessment under the blueberry production assistance program.

Delineation Forms. The bill requires the DEQ to give an applicant a copy of any delineation forms completed by the Department associated with a permit application, upon request and at no charge.

Scope of Regulation. The bill added to Part 303 language similar to the language it added to Part 301 regarding the DEQ's powers, duties, functions, and responsibilities exercised under Federal approval of Michigan's permit program, and additional regulation to protect Michigan waters beyond the scope of Federal law.

Federal Waiver. The bill repealed Section 30325 of NREPA, which required the DEQ to pursue an agreement with the Environmental Protection Agency (EPA) to expand the categories of discharges subject to a waiver of transmission and notice requirements under the Federal Water Pollution Control Act.

(A state that administers its own program under the FWPCA must transmit to the EPA Administrator a copy of each permit application it receives, as well as notice of every action related to consideration of the application. The Administrator may object to issuance of the permit based on specific grounds, and the state may not issue it unless it modifies the permit in accordance with the Administrator's comments. Alternatively, the state may request a public

hearing. If the state does not submit a revised permit or request a hearing within a prescribed time period, the Secretary of the Army may issue the permit in accordance with Federal guidelines and requirements.

The EPA Administrator is authorized to waive the transmission and notice requirements at the time he or she approves a state's permit program for any category of discharge within the submitting state.)

Part 303 Repeal. The bill provides that Part 303 is repealed 160 days after the effective date of an order by the U.S. EPA Administrator withdrawing approval of the State program under Section 404(g) and (h) of the FWPCA. (Those sections are described above in the discussion of Part 301.)

Part 325: Great Lakes Submerged Lands

Part 325 requires a person to obtain a permit from the DEQ in order to 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, or 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 for navigation or any other purpose.
- Dredge or place spoil or other material on bottomland.
- Construct a marina.

The bill reduced from \$100 to \$50 the fee for a project in a category of activities for which a general permit is issued.

Previously, the fee for activities included in a minor project category was \$50. The bill increased this amount to \$100.

MCL 324.1307 et al.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill will have a likely positive fiscal impact on the Department of Environmental Quality and no fiscal impact on local units of government. Under the bill, permit fees for Part 301 projects in minor categories are increased from \$50 to \$100. Additionally, general permit fees issued under Parts 303 and 325 are reduced from \$100 to \$50, and minor project permit fees are increased from \$50 to \$100. Based on the number of permits issued under these parts in fiscal year 2011-12, the changes will generate approximately \$90,000 in additional annual revenue for the DEQ.

The bill also might have created some new administrative costs to the DEQ as the bill required the DEQ to develop a blueberry production assistance program as well as develop a general permit for activities established pursuant to the Drain Code. Costs related to the program and permit development would have come from existing DEQ resources.

Fiscal Analyst: Josh Sefton

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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.