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BILL



ANALYSIS

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Senate Bill 363 (as reported by the Committee of the Whole)  
Sponsor: Senator Tom Casperson  
Committee: Natural Resources

Date Completed: 11-23-15

### **RATIONALE**

In Michigan, property rights along the Great Lakes shoreline do not extend to the bottomlands of the Great Lakes; the bottomlands are subject to the public trust doctrine, meaning that the State owns them and has an obligation to maintain them for the benefit of the public. Thus, shoreline property owners who wish to build structures in the water, such as docks and breakwalls, are required to request from the Department of Environmental Quality (DEQ) a lease agreement for use of the bottomlands. Under the Natural Resources and Environmental Protection Act, the DEQ determines the amount a private property owner must pay to enter into such an agreement. This charge is considered compensation to the public for use of the bottomlands. It has been suggested that the charge should be nominal in the case of a breakwater that forms a private, noncommercial harbor, and should be waived if the leaseholder allows public use of the harbor during storms.

### **CONTENT**

**The bill would amend Part 325 (Great Lakes Submerged Lands) of the Natural Resources and Environmental Protection Act to do the following:**

- **Limit to \$10 per year the amount that the Department of Environmental Quality could charge a littoral property owner for a Great Lakes bottomland lease for the placement of a breakwater that formed a private harbor, if the property owner did not use the harbor for commercial purposes.**
- **Require the DEQ to waive the annual charge if the littoral owner allowed public use of the harbor during storms.**

Part 325 authorizes the DEQ, after finding that the public trust in the waters of the Great Lakes will not be impaired or substantially affected, to enter into agreements to lease or deed unpatented Great Lakes bottomlands belonging to or held in trust by the State. An applicant for such an agreement must be a riparian or littoral<sup>1</sup> owner of property touching or situated opposite the unpatented land, or an occupant of that land. If the DEQ determines that it is in the public interest to grant a deed or lease to an applicant or enter into an agreement to allow use and improvements in the waters, the Department must determine the amount of consideration the applicant must pay to the State for the conveyance or lease of the land. The DEQ must forward the money to the State Treasurer to be credited to the Land and Water Management Permit Fee Fund.

Under the bill, if a private harbor formed by a breakwater erected on unpatented lake bottomlands were not used by the littoral owner for commercial purposes, the consideration for a lease for the breakwater to occupy the bottomlands and for exclusive use of the waters of the harbor could not exceed \$10 annually. The DEQ would have to waive the annual charge if the littoral owner agreed to allow the harbor to be used by the public as a harbor of refuge during storms.

<sup>1</sup> Generally, "riparian" relates to land adjacent to a river or stream and "littoral" relates to land abutting an ocean, sea, or lake. Within the context of Part 325 of the Natural Resources and Environmental Protection Act, "littoral" refers to the shore of a Great Lake.

The bill would take effect 90 days after it was enacted.

MCL 324.32505

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

A number of structures on Great Lakes bottomlands were constructed before the lease requirement was established. Thus, the current charge as determined by the DEQ has not been imposed on all of the landowners who are statutorily subject to it. In some cases, property owners are not even made aware of the bottomland lease agreement and payment requirement until they apply for permits to repair structures that were built years ago, often by a previous owner. It is unreasonable to charge a littoral property owner a significant amount for a breakwater, especially one that has existed for decades without incident. Breakwaters can boost the recreational value of the adjacent property and, when they form harbors of refuge, also provide a benefit to the public. Littoral owners seeking to maximize enjoyment of their property by installing these improvements on bottomlands should not be subject to a burdensome payment obligation. Given the vastness of the Great Lakes shoreline, individual noncommercial breakwaters do not lessen the lakes' value to the public. Thus, it would be appropriate to limit the charge for a breakwater lease to \$10 and waive it if the leaseholder agreed to open the resulting harbor to the public during storms.

**Response:** The lease payment serves as equitable compensation to the public for a private party's occupation of the public trust bottomlands. Although some people feel that the DEQ's current process for determining the charge results in excessive payments in some cases, whether \$10 per year would be sufficient is questionable. Furthermore, the bill would require that the charge be waived altogether if a leaseholder agreed to allow public use of a harbor created by a breakwater during a storm; property owners, however, should allow harbor access to all boaters during a storm, regardless of any financial incentive. Also, it is likely that all bottomland leaseholders would take advantage of the waiver provision, essentially eliminating this revenue stream to the Department. The bottomland lease charge should not be capped or eliminated indiscriminately; rather, any necessary adjustment should be made after careful examination to determine the appropriate charge to qualify as equitable compensation for use of this public resource.

### **Opposing Argument**

Hard structures such as breakwaters generally have a negative impact on aquatic ecosystems and neighboring shoreline property. The structures can deflect waves in a manner that results in scouring of the lake bottom and increased water turbidity, which can be detrimental to spawning areas and vegetation that provides valuable habitat for desired species. These changes also can facilitate the establishment of invasive species. Furthermore, the impact can extend far beyond a structure's length by disrupting the flow of sediment and redirecting waves so as to cause shoreline erosion. Additionally, while the localized effects of a singular bottomland structure might appear to be negligible, the cumulative environmental impact if multiple land owners along a particular stretch choose to construct breakwaters can be significant. Contrary to the DEQ's public trust obligation to oversee the bottomlands for public benefit, reducing the lease charge to \$10 or eliminating it would encourage breakwater construction at the expense of the environment. The current process the DEQ uses to establish the lease charge enables the Department to take into account the impact a breakwater could have both on the value to the property owner and on the public through the deterioration of aquatic ecosystem services. Rather than reducing the amount a littoral owner must pay for occupation of the public bottomlands, it would be more prudent for State law to promote the removal of existing structures or, alternatively, to encourage softer and less harmful design strategies for breakwaters.

**Response:** In some cases, the environmental impact of a breakwater actually can be positive; for example, the breakwater might redirect wave action in a way that minimizes erosion. Reducing the lease charge to \$10 and eliminating it in the case of a harbor of refuge would strike an appropriate balance between the interests of the littoral owner, the public, and the environment.

Legislative Analyst: Julie Cassidy

## **FISCAL IMPACT**

The bill would have a minor, but negative fiscal impact on the Department of Environmental Quality, and no fiscal impact on local units of government. In total, the DEQ has identified 26 breakwaters that would be subject to the proposed \$10 fee. The DEQ currently receives about \$15,000 per year from these leases, which could be lost under the bill and replaced with up to \$260 in lease charges. Revenue from these charges is deposited into the Land and Water Management Permit Fee Fund, and would continue to be under the bill, albeit at a reduced amount.

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.