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BILL



ANALYSIS

Telephone: (517) 373-5383  
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Senate Bill 409 (as reported without amendment)  
Sponsor: Senator Tom Casperson  
Committee: Natural Resources

Date Completed: 6-21-17

### **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. The State owns these bottomlands and has an obligation to maintain them for the benefit of the public. Thus, shoreline property owners who wish to build permanent 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. Some people have been suggested that the charge for private use of these bottomlands should be decreased and a new fee structure should be established.

### **CONTENT**

**The bill would amend Part 325 (Great Lakes Submerged Lands) of the Natural Resources and Environmental Protection Act to allow the Department to enter into a lease with the owner of waterfront property, occupied for single-family residential purposes, to use the abutting unpatented lake bottomlands and water over those bottomlands for a private harbor; and specify how the consideration would be calculated and paid.**

Part 325 authorizes the DEQ, after finding that the public trust in the water 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 water, 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, the Department could enter into a lease with the owner of riparian or littoral property, occupied only for single-family residential purposes, to use the abutting unpatented lake bottomlands and water over those bottomlands for a private harbor if all of the following conditions were met:

- The private harbor was formed by a breakwater erected on unpatented lake bottomlands.
- The private harbor was used exclusively for private, noncommercial recreational watercraft.
- The full term of the lease was 50 years consisting of two 25-year terms.

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<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.

For a lease entered into on or after the bill's effective date, the consideration would have to be a lump-sum payment at the beginning of the first 25-year term of the agreement of 1% of the current State equalized value of the lessee's upland riparian or littorial property or payment of the lump sum pursuant to a schedule as agreed by the Department. The same would apply to the second 25-year term of the agreement.

Unless otherwise requested by the lessee and agreed to by the Department, for a lease entered into before the bill's effective date, the Department would be required to credit any lease payment made in 2016 against the future payments owed under the payment agreement between the Department and the lessee.

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

MCL 324.32505 & 324.32511

## **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 1% of the State equalized value of the land every 25 years.

**Response:** While some harbors may not have been assessed and some owners may not have been charged fees, the fees are not new. These lands are held in public trust. Public trust doctrines and principles go back to Roman law and are recognized today by the U.S. Supreme Court.<sup>2</sup> The State is the trustee for the owners of the bottomlands, who are the people of the State. The statute was amended in the early 1960s to allow for use agreements for bottomland occupation. By 1982, rules specifically required lease agreements for commercial, industrial, and private waterfront owners.

### **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 would

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<sup>2</sup> Ed Owens, "Public Trust Doctrine | NRPA", Natural Resources Protective Association website, retrieved 6-14-17.

encourage breakwater construction at the expense of the environment. According to data supplied by the DEQ, overall fee revenue would be reduced to less than one-third of current collections. In one case, for example, an owner's annual lease payment of \$500 would be replaced with a lump-sum payment of \$729 for 25 years, or approximately \$29 per year. In another case, an annual payment for 25 years, or about \$16 per year.

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. Furthermore, the reduced payment would be limited to private harbors adjacent to single-family residential property. There are only 22 parcels in the entire State at this time that would be affected, and the total annual lease payments generate only \$10,636.

Legislative Analyst: Nathan Leaman

### **FISCAL IMPACT**

The bill would likely not have a significant fiscal impact on the Department of Environmental Quality, and would have no fiscal impact on local units of government. Under the bill, the Department would be allowed, in certain circumstances, to lease bottomlands for use as a private noncommercial harbor to property owners with adjacent land. It is not clear where revenue derived from these leases would go; some sections in Part 325 credit revenue to the State General Fund, whereas others credit revenue to the Land and Water Management Permit Fee Fund. In either case, the amount of revenue this bill would likely generate is not expected to be significant.

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.