SFA BILL ANALYSIS

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Senate Bill 151 (Substitute S-1 as passed by the Senate)
Senate Bill 152 (as passed by the Senate)
Sponsor: Senator Dick Posthumus
Committee: Natural Resources and Environmental Affairs

Date Completed: 9-5-89

RATIONALE

According to the Department of Natural Resources (DNR), approximately 6% of Michigan's land area is considered prone to flooding, and the DNR estimates the cost of flood damage in the State at between $60 million and $100 million annually. Damage to property and natural resources reportedly has increased significantly as floodplains and watersheds have been developed, and some claim that traditional management techniques (e.g., zoning) have led to increased flooding problems. These people contend that there is a need to address the cycle of flooding and rebuilding in Michigan, because current programs and policies may in fact reinforce such a cycle. They argue that both Federal and State emergency programs strive to return flood victims to their property quickly, thus often ignoring the possibility of alternatives such as relocating or flood-proofing the structures. In addition, current flood management programs emphasize regulating only new or replacement floodplain activities and do not provide for the delegation of floodplain regulatory authority to local units of government. Some people feel that a comprehensive flood damage reduction statute should be enacted to centralize the responsibility for storm water and flood management within the DNR, while allowing regulatory authority to be delegated to local units; improve floodplain mapping; authorize the designation of critical storm water runoff areas; and provide for a State fund to mitigate damage due to flooding and encourage flood-proofing measures.

CONTENT

Senate Bill 151 (S-1) would create the "Flood Damage Reduction Act" to do all of the following:

- **Designate the Department of Natural Resources (DNR) as the agency responsible for matters concerning flood and storm water management.**
- **Establish the "Flood Damage Mitigation Fund" and provide for its use.**
- **Allow the DNR or an authorized community to issue a floodplain alteration permit.**
- **Allow the DNR to designate "authorized communities" and "authorized public agencies" and specify those entities' powers under the bill.**
- **Provide for the monitoring and revocation of a community's or agency's authorized status.**
- **Allow the DNR to determine whether a "critical storm water runoff area" should be designated; and permit a community to develop and implement a "flood damage reduction program".**
- **Make other provisions regarding compliance with existing Acts;**

S.B. 151 & 152 (9-5-89)

inspections and investigations; notice requirements; appeal procedures; penalties for violations of the Act; and legal actions to implement or enforce the proposed Act.

The bills are tie-barred and would take effect on January 1, 1990.

Senate Bill 152 would amend Public Act 245 of 1929, which created the Water Resources Commission, to bring it into conformity with Senate Bill 151.

Senate Bill 151 (S-1)

DNR Responsibilities

The bill specifies that the DNR would be the State agency to "cooperate and negotiate with the federal government, other state agencies, communities, or other persons on matters concerning flood control and floodplain, floodway, and storm water management activities". The DNR could enter into agreements with any of those entities to make studies regarding floodplains and could determine the location and extent of various flood-related designations. In addition, the DNR would be required to do all of the following:

- Create a "technical reference center" with information on floodplains and critical storm water runoff areas.
- Develop an information dissemination and education program regarding flood hazards, floodplain management, and storm water management.
- Prepare guidebooks for flood preparedness planning, floodplain regulations and storm water management programs, and floodplain and storm water studies, and outline procedures for establishing floodplain design standards.
- Assist communities in the preparation of floodplain regulations and storm water management programs.
- Review and approve floodplain and storm water studies completed by Federal, State, community, or private agencies.
- Prepare a standardized permit application form for floodplain alterations and a priority list for recommending the order in which floodplain studies and storm water studies should be completed by Federal or State agencies. (The list would have to be updated annually.)

The DNR would be required to cooperate in disaster planning and preparedness activities, consistent with the Michigan Emergency Preparedness Plan created under the Emergency Preparedness Act. The Department also would have to participate in the integration of its flood damage reduction resources into the Michigan Emergency Preparedness Plan as well as the integration of the flood damage reduction resources of communities and available private resources into the communities' emergency operation plans. In the case of an actual disaster or a disaster training drill, the DNR would have to provide flood damage reduction resources pursuant to the Michigan Emergency Preparedness Plan.

Flood Damage Mitigation Fund

The bill would create the Flood Damage Mitigation Fund in the State Treasury. The Fund would consist of appropriations by the Legislature, fees established in the bill, and any gifts and donations. The amount accumulated in the Fund could not exceed $1 million, exclusive of interest and earnings. Any amount over $1 million would have to be deposited into the State's General Fund.

The Treasurer would have to invest the money in the Fund, crediting to it any interest and earnings. Unencumbered balances at the close of each fiscal year would remain in the Fund and could not revert to the General Fund. Money in the Fund could be spent by the DNR only for grants or a 3% subsidy on a loan from a public lending institution to individuals for flood-proofing measures in areas declared to be in a state of disaster. A grant could not exceed 50% of the cost of the flood-proofing measures or $5,000, whichever was greater. An interest subsidy would have to be applied to the loan principal in the form of a discounted lump-sum payment based on the first $25,000 of eligible costs. Applications for subsidies would have to be processed in the order that

the DNR received them. The DNR would have to administer the grants in consultation with the Department of State Police.

Applications for grants or interest subsidies would have to be postmarked no later than 90 days after a declaration of a state of disaster. Applications would have to be in a form required by the DNR and include all of the following:

-- An estimate and description of damage caused by the flood.
-- Certification by a licensed professional engineer or surveyor to the elevation of the floors of the existing building at national geodetic vertical datum.
-- An estimate of cost to elevate or flood proof the building to a minimum of one foot above the 100-year flood elevation.

The installation of seawalls or dikes, landscaping, and backfilling of property would not be eligible for grants or interest subsidies.

A payment from the Fund could be made upon the certification of a licensed professional engineer, architect, or building inspector that at least 80% of the eligible work was completed and a complete application had been approved by the DNR. If money in the Fund were insufficient to meet the needs of a flood disaster, the DNR Director could request, in consultation with the State Police, a supplemental appropriation for an area that was declared to be in a state of disaster.

Floodplain Alteration Permits

The bill would prohibit the alteration of a floodplain without either a permit from the DNR or an authorized community or an exemption from the requirements of the proposed Act. A permit for an alteration of a floodplain could not be issued for the construction of a residence, the substantial improvement of a residence, or the renovation of a structure into a residence in a floodway.

A permit for floodplain alteration could be issued if the following conditions were met:

-- The proposed alteration likely would not cause "harmful interference" (i.e., causing an increased water level; an increased velocity, or a change in direction of flow of a lake or watercourse which could likely cause damage to property; a threat to life, or of personal injury; or pollution, impairment, or destruction of water or other natural resources).
-- All buildings in the proposed alteration were constructed so that the lowest portion of all horizontal structural members supporting floors were elevated above the 100-year flood elevation. (A "100-year flood" would mean "a flood which has a 1% chance of being equaled or exceeded in any given year".)
-- All basement floor surfaces were located at or above the 100-year flood elevation, and all nonresidential buildings were elevated or flood-proofed to or above the 100-year flood elevation.

An alteration permit would not be needed for the tilling of land for agricultural uses; a flood control project authorized by a Federal agency; an improvement to, or maintenance of, a county or intercounty drain under the Drain Code; a floodplain alteration by an authorized public agency; or stream crossings for logging purposes permitted by the DNR under the Inland Lakes and Streams Act.

Application for a permit would have to be on a form prescribed or approved by the DNR and would have to include information that the DNR or an authorized community required to assess the proposed alteration's impact on the floodplain. If an alteration included activities at more than one location in a floodplain, one application would be sufficient. Application for a permit from the DNR would require a $500 fee, $50 of which would have to be credited to the Flood Damage Mitigation Fund; an application submitted by a local governmental unit would not require a fee. An application to the DNR for a minor project permit, however, would require a fee of $100. Amounts collected from such applications would have to be credited to the General Fund and be available for appropriation to the DNR "to defray the cost of reviewing plans and specifications and field inspections to determine compliance with permits" issued under the bill. An application for a permit from an authorized community would require a fee based on the community's costs. The community could retain the fee as compensation for its

administrative costs.

The DNR would have to submit copies of applications it received to each of the following for review:

-- The Director of the Department of Public Health, or the local health department designated by the Director.
-- The local unit and county where the project would be located.
-- The local soil conservation district where the project would be located.
-- The county Drain Commissioner, or the person designated to perform the responsibilities related to county drains.
-- The local Watershed Council organized under the Local River Management Act, if one existed where the project would be located.
-- Adjacent property owners.

An application would have to contain a notice that the DNR could grant the application, unless a written objection was filed within 20 days after mailing the notice for review. The DNR would have to review all written objections and attempt to resolve those objections prior to issuing a permit. The DNR could hold a public meeting to attempt to resolve the objections.

The DNR could establish minor project categories of activities and projects that were similar in nature and had a minimal potential for causing harmful interference. The DNR or an authorized community could act on applications for such minor projects without providing public notice. An authorized public agency could proceed on a minor project without providing public notice.

Authorized Communities and Authorized Public Agencies

Authorized Communities. The DNR would have to determine whether floodplain mapping in a community defined the elevations and limits of the floodplain and floodway to the extent necessary to allow it to apply for designation as an authorized community. A map of the floodplain area within a community would have to be sent to the community with a letter of notification that outlined powers, duties, and responsibilities of an authorized community. If a community wished to become authorized before adequate mapping was developed, it would have to request the DNR to review the mapping needs and to place the community on the priority list for floodplain studies. A community could apply for designation as an authorized community if it did all of the following:

-- Prepared floodplain regulations that met or exceeded the rules for floodplain management standards promulgated under the bill and submitted them to the DNR.
-- Agreed to maintain a file of floodplain permits with certifications that the project was built in accordance with approved plans and that indicated the elevation at national geodetic vertical datum to which a structure had been elevated or flood-proofed. (The file would have to be made available to the DNR upon demand.)
-- Agreed to make available or to post in a prominent public location a map depicting the limits of floodplain within the community.
-- Agreed to fulfill the public notice requirements regarding applications for permits and to notify the DNR at least 20 days before taking final action on a permit application.

The DNR would have to review and either approve, reject, or return for correction a community's application within 90 days after its receipt. If the DNR failed to act within the 90-day period, the authorization would be considered granted at the time that the floodplain regulations were legally enforceable. If a community were granted authorization, the DNR would have to delegate to it the authority to review and approve or reject floodplain alteration permits and to administer and enforce floodplain regulations within the community's jurisdiction.

An authorized community's assessing officers would have to make appropriate allowance in assessed valuation for losses of value resulting from regulation of land in floodplain areas as provided under the General Property Tax Act.

Authorized Public Agencies. A public agency responsible for designing and constructing

public facilities that may be located within a floodplain could apply to the DNR for designation as an authorized public agency by submitting to the DNR floodplain design standards and procedures that at least equaled the bill's requirements or those of rules promulgated under the bill.

The DNR would have to review and either approve, reject, or return for correction, the floodplain design standards and procedures within 90 days after receipt. If the DNR did not act within the 90-day period, the standards and procedures would be considered approved. If an agency's design standards and procedures were approved, the agency would be designated as authorized and could conduct floodplain alterations without a permit from the DNR or an authorized community. An authorized public agency would have to give public notice of its alteration intentions and notify the DNR of its decision to alter or occupy a floodplain except for minor project categories. The notice would have to include certification that the alteration was in accordance with the agency's design standards and procedures. The notification also would have to indicate the extent of work to be done in the floodplain and would have to be sent to the DNR at least 20 days before the alteration was begun.

Monitoring and Revocation

The DNR periodically would have to monitor an authorized community's or authorized public agency's administration of its programs to ensure compliance with the bill's requirements. Upon a determination that the floodplain regulations or design standards and procedures were not administered or enforced in accordance with the bill, the DNR could revoke an authorization status. A revocation would become effective 31 days after the date the community or public agency received notice of the revocation. A revocation would have to specify the facts and conduct warranting the action.

The revocation would not become effective if, within 30 days after receiving the revocation notice, the public agency or community were able to demonstrate to the DNR satisfactorily one of the following:

- -- The alleged violations did not occur.
- -- The alleged violations were accidental and the agency or community had been operating in compliance with regulations, design standards, and procedures; was promoting floodplain management; and was able to provide assurances that corrective measures had been taken and future operation would be in full compliance with regulations, design standards, and procedures.

In addition, the revocation would not become effective if, within 30 days after receipt of the revocation notice, the community or agency requested a contested hearing pursuant to the Administrative Procedures Act.

Runoff Areas and Flood Damage Reduction

Runoff Areas. The bill would require the DNR to determine if a "critical storm water runoff area" should be designated. (A "critical storm water runoff area" would be defined as "an area where storm water studies have shown that increases in storm water runoff have caused, or are projected to cause, a harmful interference".) If such an area were designated, the DNR would be required to notify the affected communities and send a map of the appropriate runoff area, outlining recommendations for management of the area. A public hearing would have to be held in the area, and communities in the area could appeal the results of the study to the DNR within 90 days after the public hearing.

Upon notification of a community by the DNR that it was within a critical storm water runoff area, the community could adopt, administer, and enforce a storm water management program within its jurisdiction. The community would have to submit its program to the DNR for informational purposes. Within the runoff area, the DNR would have to preserve water storage in floodplains and in wetlands, if the wetlands were regulated under the Wetland Protection Act.

Flood Damage Reduction. Under the bill, communities would be required to cooperate with the DNR and Federal agencies in evaluating flooding potential and identifying floodplains within their jurisdiction. Communities also could develop and implement a flood damage reduction program. Such a

program would have to complement local floodplain regulations and storm water management programs and would be encouraged to do all of the following:

-- Promote public education concerning local flood hazards and preparedness planning and publicize the boundaries of the floodplain and the critical storm water runoff areas.
-- Discourage the placement of public facilities and utilities where such placement would encourage the development of floodplains.
-- Preserve publicly-owned floodplains and wetlands and provide for the acquisition of floodplains, wetlands, and storm water storage areas.
-- Insure that community development goals, plans, and proposed capital improvements, including flood control works, were consistent with the bill.

Other Provisions

Compliance. The bill specifies that any action taken under the bill could not "unreasonably impair the public trust and environmental values in the adjacent waters" and could not be in conflict with any of the following Acts:

-- Public Act 245 of 1929, which created and regulates the Water Resources Commission.
-- The Environmental Protection Act.
-- The Natural River Act.
-- The Inland Lakes and Streams Act.
-- The Soil Erosion and Sedimentation Control Act.
-- The Shorelands Protection and Management Act.
-- The Wetland Protection Act.

Inspections and Investigations. The DNR or its agent or an authorized community or its agent, could enter in or upon any private or public property for the purpose of inspecting and investigating conditions relating to flooding potential and the alteration of floodplains, at any reasonable time and upon proper identification, notice, and request.

Notice Requirements. Before real property containing a floodplain were sold by the State or an authorized community, the purchaser would have to be notified of the existence of the floodplain and that the property could be subject to restrictions under the bill.

Appeal Procedures. Either of the following could be contested by an informal meeting with the DNR:

-- An authorized community's enforcement and administration of floodplain regulations or an authorized public agency's adherence to floodplain design standards and procedures, charging noncompliance with the bill or rules promulgated under it.
-- The issuance of an alteration permit by the DNR or an authorized community, within 30 days after the action on the permit.

Following an informal meeting, a person could request a contested case hearing on the matter pursuant to the Administrative Procedures Act.

Penalties for Violations. Anyone who altered or allowed the alteration of a floodplain in violation of the bill would be guilty of a misdemeanor, punishable by a fine of not more than $2,500 for each occurrence. A person who was required to obtain a permit under the bill but did not do so would have to be fined no less than twice the amount of the fee for the appropriate permit application. A person who willfully or recklessly violated a condition of an alteration permit would be guilty of a misdemeanor, punishable by a maximum fine of $2,500 per day.

Legal Action. The DNR, in conjunction with the Attorney General, could bring an action in the name of the people of the State to implement or enforce the proposed Act. The State, community, or other person could bring an action to restrain or prevent any violation of the proposed Act, rules promulgated under it, or local floodplain regulations adopted and approved pursuant to it.

Senate Bill 152

The bill would amend Public Act 245 of 1929, which created the Water Resources Commission, to remove from the Commission and grant to the DNR authority and responsibilities in matters concerning the water

resources of the State. The bill also would repeal Sections 5a and 5b of the Act, which authorize the Commission to make regulations regarding the prevention of "harmful interference with the discharge and stage characteristics of streams"; and prohibit the occupation, with certain exceptions, of lands in a flood plain, stream bed, or channel.

MCL 323.2a et al.

FISCAL IMPACT

Senate Bill 151 (S-1) could have both cost and revenue implications for State and local government.

According to the DNR, implementation of the bill would require one additional FTE and $260,000. The FTE and $60,000 would be used to define critical storm water areas. Approximately $200,000 would be used for technical reference center and guidebook activities. There could be some additional costs associated with administration of the "Flood Damage Mitigation Fund", but these could be eligible for Federal support. The bill also would authorize delegation of some responsibilities to local communities, which could increase local costs.

The $100 to $500 permit fee would generate $150,000 in revenue. Using between $30,000 and the current annual permit volume, a maximum of $15,000 could be credited to the Fund and $30,000 for administrative costs. This is an approximation because there could be either an increase in volume due to expanded permitting activities, or a decrease due to delegation of responsibility to local governments (which could then expect a revenue increase). Additional revenue also would be generated from penalties.

Senate Bill 152 would have no fiscal impact on State or local government.

ARGUMENTS

Supporting Argument

The bill would allow the DNR and local units of government to take steps toward reducing flood hazards in Michigan. By requiring the DNR to establish a technical reference center, develop educational programs, and prepare guidebooks for flood preparedness planning and floodplain regulations, the bill would provide for greater awareness of flood hazards and floodplain management techniques. In addition, requiring floodplain alteration permits from either the DNR or an authorized community for floodplain development projects would ensure that proper flood protection measures were taken by the developers of such projects. Further, by establishing the Flood Damage Mitigation Fund, the bill would encourage property owners in areas that were damaged by floods to use flood-proofing measures in making needed repairs.

Supporting Argument

The DNR already regulates floodplain activities, but that authority is somewhat fragmented and limited. For instance, while Public Act 245 of 1929 grants the Water Resources Commission broad authority to deal with matters concerning the State's water resources, various executive orders, according to the DNR, grant the Department the authority to regulate certain floodplain activities. In addition, the DNR claims that the "emphasis of the current state Flood Hazard Management Program is on controlling only new or replacement floodplain encroachments" and does not address the alteration of current floodplain developments, flood damage mitigation efforts, improved mapping of floodplains, or educational efforts regarding floodplain and storm water management. The bill would codify and centralize the authority to regulate floodplain activities as well as expand regulatory authority over development projects on floodplains.

Opposing Argument

The bill would grant too much regulatory authority to both the DNR and the local unit of government. Either of those public entities could use its regulatory authority to hold up other agencies' public projects. For instance, although the Department of Transportation (DOT) could be designated as an "authorized public agency" for purposes of its road construction projects, it would have to file floodplain design standards and procedures with the DNR in order to qualify for that designation and would have to notify the DNR of every project it undertook. In addition, the DOT could be subject to many different local regulations as well as the DNR's State regulations, even on a single project.

Opposing Argument

While the bill's proposed efforts to encourage the use of flood-proofing measures in the repair of flood-damaged property are admirable, prevention of such damage should be a matter for the property owners themselves, local zoning authorities, and insurance companies. There is no reason that a public fund, consisting of tax revenues and permit fees, should be used to subsidize floodplain property owners in repairing and improving their damaged property.

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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.