



Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 785 (as enacted)  
Sponsor: Senator Patricia L. Birkholz  
Senate Committee: Natural Resources and Environmental Affairs  
House Committee: Great Lakes and Environment

**PUBLIC ACT 120 of 2009**

Date Completed: 11-23-09

**RATIONALE**

In 1972, Congress enacted the Water Pollution Control Act, commonly known as the Clean Water Act (CWA). Section 404 of the CWA provided regulatory authority over physical alteration of the nation's waters--including wetlands--to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) jointly. Five years later, Congress amended the CWA to allow states to manage the Section 404 program in wetlands and waters other than "traditionally navigable waters" (such as the Great Lakes) in order to streamline the regulatory process and to help alleviate some of the regulatory and funding burden on the USACE. Additionally, Section 401 of the CWA allows states to veto federally issued permits in certain cases through a water quality certification.

In 1984, the State of Michigan was authorized to administer the Section 404 program. Although many other states also have wetland regulations, Michigan is one of only two states that have been authorized by the EPA to issue permits that also include Federal permit authorization for wetland alteration. In the rest of the nation, a permit is required from the USACE for work in wetlands, lakes, and streams.

In her fiscal year 2009-10 budget recommendation, Governor Granholm proposed elimination of the State wetland management program, estimating \$2.1 million in savings from returning control of the program to the Federal government. Some people, however, believe that the wetland program should remain at the State level. In order to accomplish this, it was proposed that the program be supported for

the time being with State environmental protection funds, and that a Wetland Advisory Council be created to make recommendations on the long-term operation of the program, including funding. In addition, it was suggested that the permitting process should be more streamlined and that the State should examine the expansion of cranberry farming as a potential opportunity for economic development.

**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 all of the following:**

- **Revise provisions regarding the establishment by the Department of Environmental Quality (DEQ) of minor project categories of wetland activities and projects.**
- **Revise notice and hearing requirements for wetland project permits.**
- **Require the DEQ to implement a pilot program aimed at increasing the efficiency of the wetland project permitting process, and a pilot program to facilitate the development of wetland mitigation banks.**
- **Require the DEQ to report pilot program results and recommendations to a Wetland Advisory Council.**

- Require the Agriculture Commission, in consultation with the DEQ, to identify Michigan land suitable for cranberry production activities.
- Provide that a guideline, bulletin, interpretive statement, or instructional form under Part 303 may not be given the force and effect of law.
- Require the DEQ to adopt a new guidance document for the evaluation of feasible and prudent alternatives to proposed wetland activities.
- Prohibit the DEQ from denying a permit application because of the availability of a feasible and prudent alternative before the new guidance document takes effect unless certain conditions are met.
- Authorize the DEQ to impose on certain wetland permits a requirement for compensatory wetland mitigation.
- Require the DEQ to coordinate permits under Parts 301, 303, and 325 consistent with nationwide permits, as appropriate.
- Require the DEQ to pursue an agreement with the USACE to issue State programmatic general permits under Federal law.
- Require the DEQ to develop a program to facilitate wetland restoration and enhancement projects in coordination with government entities and nongovernmental groups.
- Require the DEQ to pursue an agreement with the EPA to expand the categories of discharges subject to a waiver from certain Federal requirements.
- Authorize the DEQ to provide certification that a discharge into navigable water complies with applicable requirements.
- Create the Wetland Advisory Council and require it to report to the Governor and the Legislature on the administration and enforcement of the State's wetlands program, including recommendations on potential long-term changes in program structure.

The bill also required the Legislature to appropriate money from the Cleanup and Redevelopment Trust Fund and the

**Community Pollution Prevention Fund to the Environmental Protection Fund, and from that Fund for the administration of Part 303, in order for the bill to take effect.** (As described below, the required appropriations are contained in Public Acts 118 and 240 of 2009.)

#### Part 13: Permits

Under Part 13, "permit" means a permit or operating license required by specific sections of NREPA or by rules promulgated under those sections. With regard to Section 30304, the term refers to a State permit for dredging, filling, or other activity in a wetland. Under the bill, "permit" also includes an authorization for a specific project to proceed under Section 30312.

(Under Section 30304, a person may not do any of the following without a permit from the DEQ:

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

Section 30312 authorizes the DEQ to issue general permits on a statewide basis or within a local unit of government for a category of activities if it determines that they are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. This section also provides that a general permit may be issued for the mowing or removal of vegetation between the ordinary high-water mark and the water's edge. The bill amended this section to require the DEQ to establish minor project categories of activities, as described below.)

Part 13 prescribes processing periods for various permits. Under the bill, the processing period for an authorization for a specific project to proceed under a general permit issued under Section 30312 is 90 days, or, if a hearing is held, 150 days.

## Part 301: Inland Lakes & Streams

Under Part 301, a person without a permit from the DEQ may not do any of the following, subject to certain exceptions:

- Dredge or fill bottomland.
- Construct, enlarge, extend, remove, or place a structure on bottomland.
- Erect, maintain, or operate a marina.
- Create, enlarge, or diminish an inland lake or stream.
- Structurally interfere with the natural flow of an inland lake or stream.
- Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.

A permit also is required in order to construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of the artificial waterway is within 500 feet of the ordinary high-water mark of an existing inland lake or stream.

Previously, the DEQ, by rule, could establish minor project categories of activities and projects that were similar in nature and would have minimal adverse environmental impact. The bill, instead, requires the Department, after providing notice and an opportunity for a public hearing, 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.

Under Part 301, each copy of a permit application must be accompanied by a statement that unless a written request is filed with the DEQ within 20 days after the submission for review, the Department may grant the application without a public hearing where the project was located. The Department may hold a public hearing upon the written request of the applicant or a riparian owner or a person or governmental unit that is entitled to receive a copy of the application. At least 10 days' notice of a hearing must be given by publication in a newspaper circulated in the county where

the project is to be located, to the person requesting the hearing, and to the people and governmental units that are entitled to receive a copy of the application. The DEQ may act upon an application for an activity or project within a minor project category without providing notices. Previously, the DEQ also could act on an application without holding a public hearing. The bill eliminated this public hearing exemption.

Previously, a final inspection or certification of a minor project completed under a permit was not required, but all other provisions of Part 301 applied. The bill deleted the statement that an inspection or certification was not required. Also, under the bill, provisions of Part 301 applicable only to general permits do not apply to a minor project.

Previously, under Part 301, the DEQ, after notice and an opportunity for a public hearing, could issue general permits on a statewide basis or within a local unit of government for projects that were similar in nature, that would cause only minimal adverse environmental effects when performed separately, and that would have only minimal cumulative adverse effects on the environment. The bill requires, rather than allows, the DEQ to issue the permits, subject to the same criteria. In addition, before authorizing a specific project to proceed under a general permit, the DEQ must provide notice but may not hold a public hearing and may not typically require a site inspection.

## Part 303: Wetlands Protection

Wetland Boundaries. The bill requires the DEQ and local units of government to apply the technical wetland delineation standards set forth in the USACE January 1987 Wetland Delineation Manual, technical report Y-87-1, and appropriate regional USACE supplements, in identifying wetland boundaries under Part 303, including Section 30307 (which prescribes procedures for permits under Part 303 and authorizes a local unit of government to regulate wetland within its boundaries by ordinance).

Pilot Program: Efficiency. The bill requires the DEQ to implement a pilot program to facilitate the role of local units of government, conservation districts,

nonprofit organizations, and wetland professionals in assisting people seeking help with completing permit applications, avoiding and minimizing impacts from a proposed project, using best management practices in a proposed project, and otherwise complying with Part 303. The bill specifies that the goals of the pilot program include increasing the efficiency of the permitting process through better use of all available resources, including DEQ staff, while protecting Michigan's wetland. The bill also provides that the pilot program does not affect the DEQ's authority to make regulatory decisions in any way.

Within 60 days after the bill's effective date, the DEQ Director must designate at least three entities to participate in the pilot program, with the goal of selecting at least one local unit of government, one conservation district, and one nonprofit organization. A proposed designation must be posted on the DEQ's website for public review and comment for at least 21 days before the designation is made.

By April 1, 2012, the DEQ and entities participating in the program must report to the Wetland Advisory Council on program results and recommendations for further refining the program.

The section regarding this pilot program will be repealed on October 1, 2012.

Pilot Program: Wetland Mitigation Banks. Under the bill, the DEQ must implement a pilot program for assisting local units of government and partnering individuals or entities in the development of wetland mitigation banks. This assistance must include supplying maps of potential wetland restoration areas for site selection, reviewing potential sites for mitigation banks, and, if the mitigation bank sponsor is a county with a population of at least 500,000, expediting review of conceptual design plans.

Within 180 days after the bill takes effect, the DEQ Director must designate two counties with a population of at least 500,000. Those counties, or municipalities and partnering individuals or entities in them, will be eligible to participate in the pilot program. A proposed designation must be posted on the DEQ's website for public

review and comment at least 21 days before the designation is made.

By April 1, 2012, the DEQ and participating entities must report to the Wetland Advisory Council on program results and recommendations for further refining the program.

The section regarding this pilot program will be repealed on October 1, 2012.

Agreement with USACE. The bill requires the DEQ to pursue an agreement with the USACE for the Corps to issue state programmatic general permits under Section 404(e) of Title IV of the Water Pollution Control Act (33 USC 1344) for activities in water over which the Corps retains jurisdiction under Section 404(g)(1) of that statute.

(Under Section 404(e), the Secretary of the Army, acting through the Chief of Engineers, may, after notice and opportunity for public hearing, issue general permits on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if he or she determines that the activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

Under Section 404(g)(1), the governor of any state that desires to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters within its jurisdiction (subject to certain exceptions) may submit to the Secretary of the Army a description of the program it proposes to establish and administer under state law or under an interstate compact. In addition, the state must submit a statement from the attorney general, or from the chief legal officer in the case of an interstate agency, that the laws of the state or interstate compact provide adequate authority to carry out the described program.)

Beginning January 1, 2011, if the application is for an activity or use in waters over which the USACE retains jurisdiction, and if the USACE has not issued a state programmatic general permit for the activity or use, if the applicant requests in the application, the

DEQ must approve or deny the application within 30 days after the USACE grants or denies a permit application for the project, or by the end of the prescribed processing period, whichever is later. If a proposed project also requires authorization under Parts 31 (Water Resources Protection), 301, 315 (Dam Safety), 323 (Shorelands Protection and Management), 325, and/or 353 (Sand Dunes Protection and Management), these requirements also apply to the DEQ's decision under that part or parts. If the USACE grants a permit for the project, the DEQ must issue a permit under Part 303 without conditions or limitations other than those imposed by the Corps unless any of the following apply:

- The wetland is a rare and imperiled wetland.
- The wetland is regionally significant for the protection of fisheries, wildlife, or migratory birds.
- The site supports designated State or Federal endangered or threatened plants, fish, or wildlife.
- The site provides flood and storm control by the wetland's hydrologic absorption and storage capacity.
- The site provides protection of subsurface water resources and provision of valuable watersheds and recharging groundwater supplies.
- The proposed project involves a use or activity not regulated under 33 USC 1344.

The DEQ must inform the applicant in writing of the basis for a finding that these requirements have not been met and the specific reasons why denial of the permit or the imposition of additional conditions or limitations is consistent with Part 303 and rules promulgated under it.

(Under the bill, "rare and imperiled wetland" means a Great Lakes marsh, southern wet meadow, inland salt marsh, intermittent wetland or boggy seepage wetland, coastal plain marsh, interdunal wetland, lakeplain wet prairie, lakeplain wet-mesic prairie, northern wet-mesic prairie, wet-mesic prairie, wet prairie, prairie fen, northern fen, patterned fen, poor fen, muskeg, rich conifer swamp, relict conifer swamp, hardwood-conifer swamp, northern swamp, southern swamp, southern floodplain forest, or inundated shrub swamp.)

These provisions apply only to the DEQ's decision under Part 303 notwithstanding that the proposed project also requires authorization under Parts 31, 301, 315, 323, 325, and/or 353.

Cranberry Production. Within 180 days after the bill's effective date, the Agriculture Commission, in consultation with the DEQ, must identify at least 2,500 acres of land suitable for cranberry production activities. The DEQ must give priority to upland sites, sites that have been drained for agricultural use and are no longer wetland, and sites that have been drained for agricultural use and continue to be wetland. The DEQ and the Michigan Department of Agriculture (MDA) must make available to the public a map of the identified areas. The bill provides that the map is for informational purposes and does not constitute a regulatory determination for purposes of Part 303.

After 2,000 acres of identified sites are developed for cranberry production activities, at least an additional 2,500 acres must be identified.

The DEQ must consider construction of cranberry beds, including associated dikes and water control structures associated with dikes, such as headgates, weirs, and drop inlet structures, to be a water-dependent activity. (Under the bill, "water-dependant" means requiring access or proximity to or siting within an aquatic site to fulfill its basic purpose.)

The following activities associated with cranberry operations may not be considered water dependent:

- The construction of roads, ditches, reservoirs, and pump houses that are used during the cultivation of cranberries.
- The construction of secondary support facilities for shipping, storage, packaging, parking, and similar purposes.

The demonstration by an applicant that there is no feasible and prudent alternative to the construction of cranberry beds, including dikes and water control structures associated with them, is not subject to the presumptions that feasible and prudent alternatives that do not involve wetlands are

available, and that a feasible and prudent alternative that does not affect a wetland will have less adverse effects on the aquatic ecosystem.

Under Part 303, if a landowner requests a preapplication meeting regarding a proposed project or permit application, the DEQ must meet with the person to review the proposed project or application in its entirety. Except as otherwise provided, the request must be accompanied by a fee. For a preapplication meeting at the DEQ's district office, the fee is \$150. The fee for a meeting at the project site is \$250 for the first acre or portion of an acre of project area, plus \$50 for each additional acre or portion of an acre, up to \$1,000. Under the bill, until October 1, 2012, there is no fee for a preapplication meeting for cranberry production activities, whether at the district office or project site.

Feasible & Prudent Alternatives. Under Part 303, a permit for a listed activity may not be approved 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. In determining whether the activity is in the public interest, the benefit that reasonably may be expected to accrue from the proposal must be balanced against the reasonably foreseeable detriments of the activity. The decision must reflect the national and State concern for the protection of natural resources from pollution, impairment, and destruction. In making its determination, the DEQ must consider specific criteria, including the availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity. Additionally, a permit may not be issued unless it is shown that an unacceptable disruption to the aquatic resources will not result. In determining whether a disruption is unacceptable, the DEQ must consider certain criteria, including feasible and prudent alternatives.

Under the bill, if it is otherwise a feasible and prudent alternative, an area not presently owned by the applicant that reasonably may be obtained, used, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered. An alternative that entails

higher costs, as described in R 281.922a(11) of the Michigan Administrative Code, is not feasible and prudent if the higher costs are unreasonable. In determining whether such costs are unreasonable, the DEQ must consider the relation of the increased cost to the overall scope and cost of the project, and whether the projected cost is substantially greater than the costs normally associated with the particular type of project.

(Under R 281.922a(11), an alternative may be considered feasible and prudent even if it entails higher costs or reduced profit. The DEQ, however, must consider the reasonableness of the higher costs or reduced profit in making its determination.)

Under the bill, a guideline, bulletin, interpretive statement, or form with instructions under Part 303 may not be given the force and effect of law. A guideline, bulletin, interpretive statement, or form with instructions is not legally binding on the public or the regulated community and may not be cited by the DEQ for compliance and enforcement purposes.

Within one year after the bill's effective date, the DEQ must adopt a new guidance document for the evaluation of feasible and prudent alternatives. The guidance document must be consistent with findings and recommendations of the U.S. EPA's Region 5 review of the program under Part 303. The DEQ must develop the document in consultation with interested parties, including the Wetland Advisory Council.

Before the new guidance document takes effect, the DEQ may not deny a permit application because of the availability of a feasible and prudent alternative based solely on the consideration of statewide alternatives, higher cost, or reduced profit unless a DEQ deputy director has reviewed the proposed denial and the DEQ has requested information from the Michigan Economic Development Corporation and applicable regional and local economic development authorities relative to the project and considered the information received.

Before the guidance document takes effect, the prescribed processing period for a permit must be extended if DEQ staff have proposed denying the permit for reasons set

forth in the bill. The extension may not be more than 45 days.

The bill prohibits the DEQ from filing a request for rule-making under the Administrative Procedures Act for rules addressing the evaluation of feasible and prudent alternatives before October 1, 2012.

General Permit Conditions. The bill specifies that a permit issued under Part 303 is not valid for more than five years. The DEQ may establish a reasonable time when construction, development, or use authorized under any permit issued under Part 303 must be completed or terminated. The Department may impose on any permit or authorization under a general permit under Part 303 conditions designed to do any of the following:

- Remove or reduce an impairment to wetland benefits, as set forth in Section 30302, that otherwise would result from the project.
- Improve the water quality that otherwise would result from the project.
- Remove or reduce the effect of a discharge of fill material.

The bill allows the DEQ to impose a condition on an authorization under a general permit only after consultation with the applicant or the applicant's agent.

(Section 30302 contains a legislative finding that a loss of a wetland may deprive the people of the State of some or all of the following benefits derived it:

- Flood and storm control by the hydrologic absorption and storage capacity of the wetland.
- Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, and rare, threatened, or endangered wildlife species.
- Protection of subsurface water resources and provision of valuable watersheds and recharging groundwater supplies.
- Pollution treatment by serving as a biological and chemical oxidation basin.
- Erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.
- Sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.)

Compensatory Wetland Mitigation. Under the bill, the DEQ may impose as a condition on any permit, other than a general permit, under Part 303 a requirement for compensatory wetland mitigation. The Department may approve one or more of the following methods of compensatory wetland mitigation:

- The acquisition of approved credits from a wetland mitigation bank.
- The restoration of previously existing wetlands, which is preferred over the creation of new wetlands where none existed previously.
- The creation of new wetlands, if the permit applicant demonstrates that ecological conditions necessary for establishment of a self-sustaining wetland ecosystem exist or will be created.
- The preservation of exceptional wetlands.

(Under the bill, "exceptional wetland" means wetland that provides physical or biological functions essential to the State's natural resources and that may be lost or degraded if not preserved through an approved site protection and management plan for the purposes of providing compensatory wetland mitigation.)

If an applicant prefers and qualifies to use approved credits from the wetland mitigation bank to provide required compensatory wetland mitigation, the DEQ may not require the applicant to provide it by any other method.

If compensatory wetland mitigation other than the acquisition of approved credits is required, a permit applicant must submit a mitigation plan to the DEQ for approval. In approving a plan, the Department must consider how the location and type of wetland mitigation support the sustainability or improvement of aquatic resources in the watershed where the activity is permitted. The applicant must provide for permanent protection of the mitigation site. The DEQ may accept a conservation easement to protect wetland mitigation and associated upland.

If a permittee carries out compensatory wetland mitigation by a method other than the acquisition of approved credits in cooperation with public agencies, private

organizations, or other parties, the permittee remains responsible for the mitigation to the extent otherwise provided by law.

The DEQ may require financial assurance to ensure that compensatory wetland mitigation is accomplished as specified. To ensure that wetland benefits are replaced by compensatory wetland mitigation, the DEQ may release financial assurance only after the applicant or mitigation bank sponsor has completed monitoring of the site and demonstrated compliance with performance standards in accordance with a schedule in the permit or mitigation banking agreement.

Minor Project Categories & General Permits. Under the bill, after providing notice and an opportunity for a public hearing, the DEQ may establish minor project categories of activities 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 DEQ may act upon an application under Part 303 for an activity within a minor project category without holding a public hearing or providing notice pursuant to Section 30307(1) or (3). A minor project category is not valid for more than five years, but may be reestablished. A minor project is subject to all other provisions of Part 303, except those applicable only to general permits.

(Under Section 30307(1), within 60 days after receiving a completed application and fee, the DEQ may hold a hearing in the county where the applicable wetland is located. The Department may approve or disapprove a permit application without a public hearing unless a person requests a hearing within 20 days after the required mailing of notification of the permit application or unless the DEQ determines that the application's impact warrants a public hearing. Under Section 30307(3), a person who desires notification of pending permit applications may make a request to the DEQ and pay an annual fee of \$25. The DEQ must prepare a biweekly list of applications and mail copies promptly to the people who requested notice.)

The bill requires the DEQ, after notice and opportunity for a public hearing, to issue general permits on a statewide basis or within a local unit of government for a

category of activities if it determines that they are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. Previously, the DEQ was allowed, but not required, to issue the permits. Part 303 provides that a general permit is not valid for more than five years. The bill allows a general permit to be reissued.

Under the bill, before authorizing a specific project to proceed under a general permit, the DEQ may provide notice but may not hold a public hearing and may not typically require a site inspection. The Department must issue an authorization under a general permit if the conditions of the permit and the requirements of Section 30311 are met. In determining whether to issue an authorization under a general permit, however, the DEQ may not consider off-site alternatives to be feasible and prudent alternatives.

(Section 30311 requires the Department to determine whether the issuance of a permit is in the public interest, whether the permit is necessary to realize the benefits derived from the activity, and whether the activity is otherwise lawful.)

Under the bill, if the DEQ determines that activity in a proposed project, although within a minor project category or a general permit, is likely to cause more than minimal adverse effects on aquatic resources, including high-value aquatic habitats, it may require that the application be processed under Section 30307.

The bill requires the DEQ to coordinate general permit and minor project categories under Parts 303, 301, and 325 consistent with nationwide permits, as appropriate.

Nationwide & Other Required Permits. The bill requires the DEQ to propose new or maintain existing general permits under Part 303 equivalent to the following nationwide permits, to the extent applicable to wetland, without further limitations:

- Maintenance.
- Scientific measuring devices.
- Survey activities.
- Oil spill cleanup.
- Moist soil management.



- Cleanup of hazardous and toxic waste.
- Storm water management facilities.
- Pipeline safety program designated time-sensitive inspections and repairs.

The bill also requires the DEQ to propose new or maintain existing general permits or minor project categories equivalent to the following nationwide permits, to the extent that the nationwide permits apply to wetland, subject to additional limitations based on best management practices and necessary to ensure that adverse environmental effects are minimal or based on other statutes:

- Outfall structures and associated intake structures.
- Minor discharges.
- Utility line activities.
- Expansion of existing cranberry production activities.

The Department may establish the additional limitations after providing notice and an opportunity for public comment.

In addition, the bill requires the DEQ to propose new or maintain existing general permits or minor project categories for all of the following:

- Cranberry production activities.
- Temporary recreational structures.
- Linear transportation projects.
- Aquatic habitat restoration, establishment, and enhancement activities, including reversion of temporary wetland restorations.
- Residential developments.
- Completed enforcement actions.
- Temporary construction, access, and dewatering.
- Agricultural activities.
- Reshaping existing drainage ditches.
- Recreational facilities.

Wetland Restoration & Enhancement Projects. The bill requires the DEQ to develop a program to facilitate ecologically responsible voluntary wetland restoration and enhancement projects in coordination with State, Federal, tribal, and nongovernmental groups specializing in wetland restoration and conservation. The program must include enhancing coordination, consistency, and operational procedures and improving and streamlining

the permitting process to facilitate a net gain in wetland quantity and/or quality.

Civil Fines & Fees. The civil fines collected under Part 303 must be forwarded to the State Treasurer for deposit in the State's General Fund. The fees collected under Part 303 must be deposited in the Land and Water Management Permit Fee Fund. Under the bill, these provisions do not apply to fines or fees collected under an ordinance adopted under Section 30307(4) (which allows a local unit of government to regulate wetland within its boundaries, by ordinance, only as provided under Part 303).

Discharge Waiver. Under the bill, the DEQ must pursue an agreement with the EPA to expand the categories of discharges subject to the waiver from the requirements of Section 404(j) of Title IV of the Water Pollution Control Act (33 USC 1344), pursuant to Section 404(k) of that Act.

(Section 404(j) requires each state that is administering a permit program to transmit to the EPA Administrator a copy of each permit application the state receives and notify the Administrator of every action related to the consideration of an application. The section establishes a process under which the Administrator may give comments to the state; the state may not issue a proposed permit if the Administrator objects, unless the state modifies the permit according to the comments; the state may request a public hearing; and the Secretary of the Army may issue the permit in accordance with applicable guidelines and requirements if the state does not resubmit a revised permit.

Section 404(k) authorizes the EPA Administrator to waive those requirements in accordance with certain guidelines at the time of the approval of a state program for any category of discharge within the state submitting the program.)

DEQ Certification. The bill authorizes the DEQ to provide certifications under Section 401 of Title IV of the Water Pollution Control Act (33 USC 1341).

(Under that section, an applicant for a Federal license or permit to conduct any activity that might result in any discharge into the navigable waters, must give the licensing or permitting agency a certification

from the state in which the discharge originates or, if appropriate, from the interstate water pollution control agency with jurisdiction over the navigable waters at the point where the discharge originates, that the discharge complies with applicable requirements.)

Wetland Advisory Council. The bill created the Council within the DEQ. The Council must include the DEQ Director or his or her designee. The Director must invite one representative of each of the following to serve as Council members: the USACE, the EPA, and the U.S. Department of Agriculture Natural Resources Conservation Service.

In addition, the Council must include the MDA and DNR Directors or their designees. The Senate Majority Leader must appoint one individual from each of the following: a statewide association of homebuilders, a statewide conservation organization, a statewide association of local units of government, and a statewide association of manufacturers. The Speaker of the House of Representatives must appoint one individual from each of the following: a statewide environmental protection organization, the largest general statewide farm organization, a statewide association of realtors, and an association of county drain commissioners. The Governor must appoint a university professor with expertise in wetland science and a wetland professional who regularly submits applications for permits and obtains them from the DEQ, as well as one individual representing each of the following: a watershed organization, natural gas or electric utilities, a conservation district, a statewide association of businesses, and the general public.

The appointments to the Council must be made within 30 days after the bill's effective date. An appointed member will serve for a term of three years.

At the first Council meeting, which the DEQ Director must call, the Council must elect from among its members a chairperson and any other officers that it considers necessary or appropriate. After the first meeting, the Council must meet at least quarterly, or more frequently at the call of the chairperson or if requested by at least two members.

The Council is subject to the Open Meetings Act and the Freedom of Information Act. Members must serve without compensation. The Council members representing the DNR, the MDA, or the DEQ, however, must serve without additional compensation.

By October 1, 2010, the Council must submit a report to the Governor, the DEQ, and the standing committees and Appropriations subcommittees of the Legislature with primary responsibility over natural resources and environmental issues. The report must evaluate and make recommendations on all of the following:

- Improving the overall efficiency of the program under Part 303, including the quality of applications submitted; and the effect of mandatory decision-making time frames on meeting the purposes of Part 303 and, if appropriate, the time frames that should apply.
- The point in the DEQ's process of decision-making on a permit application at which the possibility of mitigation should be considered.
- Actions necessary to adopt and implement measures determined by the EPA to support consistency with the requirements of 33 USC 1344, as set forth in a final report on the results of the EPA Region 5 review of the DEQ's Section 404 program, dated May 2008.

By August 15, 2012, the Council must submit another report to the Governor, the DEQ, and the applicable standing committees and Appropriations subcommittees. This report must evaluate and make recommendations on all of the following:

- Improving coordination and reducing duplication of effort with the USACE.
- The appropriate means and level of program funding under Part 303.
- Minor permit categories and general permits equivalent to the specified nationwide permits and other categories required under the bill.
- The appropriateness of the provisions related to the agreement with the USACE as a means of reducing regulatory burdens from dual Federal and State regulation.
- The promotion of the development of wetland mitigation banks.

- Ways for the public and interested parties to advise the DEQ on a continuing basis concerning the administration and enforcement of Part 303.
- Appropriate regulation of the siting, construction, and operation of cranberry production activities, in light of the benefit of cranberry production activities to the economy, the regulatory approach of other states, and other factors.
- The feasible and prudent alternative standard and its consistent application.
- Methods to assist individuals proposing a use or activity for their personal homesite and nonprofit organizations in successfully obtaining permits in a timely manner.

Additionally, the report must evaluate and make recommendations on potential long-term changes in program structure, including all of the following:

- The appropriate role of local units of government and conservation districts in the administration of Part 303.
- Scientific methods to achieve more consistent and accurate determinations of wetland functions and values for reviewing permit applications, watershed planning, conservation plans, and other purposes.
- A certification process for wetland professionals.
- The definition of wetland and wetland delineation methods, including the role of hydric soils as a factor in wetland delineation.

The scientific methods must include rapid wetland assessment and landscape level wetland assessment. Regarding the wetland professional certification process, the Council must consider information reported under the permitting process efficiency pilot program. In making recommendations pertaining to the definition of wetland and wetland delineation methods, the Council must evaluate differences in the State and Federal wetlands programs.

(Under the bill, "rapid wetland assessment" means a method for generally assessing the functions, values, and condition of individual wetlands based on existing data and field indicators. "Landscape level wetland assessment" means the use of aerial photographs, maps, and other remotely

sensed information to predict and evaluate wetland characteristics and functions in the context of the wetland's landscape position and hydrologic characteristics, the surrounding landscape, and the historic extent and condition of the wetland.)

The section pertaining to the Council will be repealed on April 1, 2013.

#### Part 325: Great Lakes Submerged Lands

Minor Project Categories. Under the bill, after providing notice and opportunity for a public hearing, the DEQ may establish minor project categories of activities 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 DEQ may act upon an application received pursuant to Section 32513 for an activity within a minor project category without providing notice pursuant to Section 32514. A minor project category is not valid for more than five years, but may be reestablished. A minor project is subject to all other provisions of Part 325, except those applicable only to general permits.

(Under Section 32513, unless the DEQ has granted a permit or the Legislature has granted authorization, subject to certain exceptions, a person may not 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, including 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, including Lake St. Clair, for navigation or other purpose.
- Dredge or place spoil or other material on bottomland.
- Construct a marina.

Under Section 32514, upon receiving an application, the DEQ must mail copies to the Department of Community Health; the clerks of the county, city, village, and township, and the drain commissioner of the

county or, if none, the road commissioner of the county, in which the project or body of water affected is located; and the adjacent riparian owners; with a statement that unless an objection is filed with the DEQ within 20 days, the Department may take action to grant the application.)

General Permits. The bill requires the DEQ, after notice and opportunity for a public hearing, to issue general permits on a statewide basis or within a local unit of government for a category of activities if it determines that they are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. Previously, the DEQ was allowed, but not required, to issue the permits. In addition, under the bill, before authorizing a specific project to proceed under a general permit, the DEQ may provide notice but may not hold a public hearing or typically require a site inspection.

Part 325 specifies that a permit issued under it is not valid for more than five years. Under the bill, a general permit may be reissued.

Permit Application. Under the bill, before any work or connection specified in Section 32512 is undertaken, a person must file an application with the DEQ. Previously, this also referred to Section 32512a.

(Section 32512a authorizes the DEQ, after notice and opportunity for a public hearing, to issue general permits on a statewide basis or within a local unit of government for a category of activities if the Department determines that they are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.)

#### Appropriations

The bill specified that it would not take effect unless the Legislature appropriated \$4.0 million from the Cleanup and Redevelopment Trust Fund and \$4.0 million from the Community Pollution Prevention Fund to the Environmental Protection Fund. In addition, the bill would not take effect unless the Legislature appropriated \$2.0

million from the Environmental Protection Fund to support the program under Part 303.

(Public Act 118 of 2009 appropriated \$1.0 million from the Cleanup and Redevelopment Trust Fund and \$1.0 million from the Community Pollution Prevention Fund to the Environmental Protection Fund. Public Act 240 of 2009 appropriated \$3.0 million from the Cleanup and Redevelopment Trust Fund and \$3.0 million from the Community Pollution Prevention Fund to the Environmental Protection Fund, and appropriated \$2.0 million from that Fund for the wetland program.)

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### **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**

Eliminating Michigan's wetland program and ceding regulatory control to the Federal government would have been detrimental to the State's natural resources, business community, and residents. Keeping control at the State level provides easier access for Michigan citizens, and State regulators likely are more responsive than those at the Federal level. For example, an applicant or permittee has more effective opportunities to appeal DEQ decisions under the State's program than he or she would under the USACE. Also, costs to permit applicants might be higher under a federally administered program, the process might involve more duplication, and permit decisions might be made in a less timely manner. Certain wetlands require that a determination be made as to whether the USACE has jurisdiction, a process that can take approximately 120 days, before the Corps even begins the permitting process. While NREPA prescribes a permit processing period and the DEQ approves over 90% of the wetland applications it receives in fewer than 60 days, the USACE does not have a mandated turnaround time. In fact, the EPA notified the DEQ that if the State transferred its wetland program to the Federal government, no permits would be approved during the transition period. This delay could have pushed projects done by homebuilders, residents, businesses, and

restoration workers into the next construction season and presented a barrier to the State's economic recovery. Furthermore, whether the State could have regained regulatory authority over wetlands once the budget situation improves is questionable.

The bill will help create certainty for businesses and property owners and protect the environment by mirroring Federal regulations, standards, and practices, while making accommodations for the State's unique natural resources when appropriate. In addition, the bill streamlines the permitting process by requiring coordination of nationwide permits and permits under various parts of NREPA; establishing a tiered system of general, minor, and individual permits; expediting general and minor permits by providing for issuance without a public hearing; and expanding the use of general permits. Also, the State and local units of government will have to use the Federal delineation manual to identify wetlands, which will improve the consistency of the program.

The functions of the Wetland Advisory Council will be similar to those of the Water Resources Conservation Advisory Council, which was created to evaluate and make recommendations regarding the State's water use policies. The Water Resources Conservation Advisory Council has been effective in identifying issues of concern and making recommendations to the Legislature to improve the fairness and utility of the State's regulatory scheme based on sound science.

The bill also provides an opportunity for local governments and conservation districts to be involved in the permitting process through the pilot program designed to improve the efficiency of the permitting process. Local officials are trusted by residents and have a strong dedication to and intimate knowledge of their communities. While Federal law does not allow local governments and conservation districts any regulatory authority, such entities can assist the DEQ in conducting wetland surveys and otherwise provide valuable knowledge and resources in the field, and assist permit applicants in the process.

The bill further protects the State's wetland resources through the pilot program to encourage the establishment of wetland mitigation banks and by allowing the DEQ to require compensatory wetland mitigation. According to the EPA, compensatory mitigation refers to "the restoration, establishment, enhancement, or in certain circumstances preservation of wetlands, streams or other aquatic resources for the purpose of offsetting unavoidable adverse impacts" due to the discharge of dredged or filled material into U.S. waters. A mitigation bank is a wetland area that has been restored, established, enhanced, or preserved and set aside to compensate for future conversions of wetlands for development activities. Permittees can then purchase credits from the bank to meet any mitigation requirements. Under a mitigation banking system, the responsibility for the implementation and success of the mitigation is transferred from the permittee to a third party. In addition to preserving the State's aquatic resources, the mitigation banking option might help stimulate development, particularly in urban areas. Furthermore, the privately owned mitigation banks that have been established to date throughout the nation have contributed hundreds of millions to the economy, demonstrating the monetary value associated with increased wetland protection.

The bill provides a stopgap solution to the potential problems of ceding control of the wetland program to the Federal government while the State examines long-term reforms to ensure the protection of Michigan's natural resources and economic vitality now and into the future.

**Response:** Some people are concerned about the provision prohibiting the DEQ, before the new guidance document takes effect, from denying an application because of the availability of an alternative based solely on consideration of statewide alternatives, higher costs or reduced profit, without review by a deputy director and consultation with the MEDC. In addition, some are concerned about the provision allowing an applicant to ask the USACE to issue a permit before the DEQ has rendered its decision. The proposals sent to the USACE under this provision, which takes effect in 2011, most likely will involve large projects in coastal wetlands, which are some of the most sensitive wetland resources in

the State. Because most of the Great Lakes shoreline has been developed, it is critical that the remaining undeveloped coastal wetlands be preserved. The bill will leave the DEQ unable to act in the case of a disagreement with the USACE and may result in unforeseen and undesirable consequences.

### **Supporting Argument**

During tough economic times, it is important that the State examines new opportunities for economic development. Currently, fewer than 300 acres are used for cranberry production in Michigan, while Massachusetts has more than 14,000 acres dedicated to cranberry farming and Wisconsin has more than 17,000 acres. According to the MSU Product Center, the economic impact of 2,500 new acres of cranberry farming could be over \$153 million during the construction of the facilities and nearly \$30 million annually. The expansion of this industry could be successful in Michigan due to its climate and natural resources. By requiring the DEQ and MDA to identify suitable acreage and waiving the preapplication fee for cranberry production activities, the bill will encourage farmers and fruit processors to consider locating their operations in Michigan.

**Response:** Under the bill, certain cranberry production activities are not subject to specific presumptions regarding feasible and prudent alternatives. These exemptions should apply only to the 4,500 acres required to be identified by the Agriculture Commission and the DEQ. Because areas with potential for cranberry production could be some of Michigan's most valuable wetlands, it is ill-advised to waive those presumptions on a statewide basis.

Legislative Analyst: Julie Cassidy

### **FISCAL IMPACT**

Department staff with cartographical skills will be necessary to locate and produce maps detailing land suitable for cranberry production. It is likely that between the MDA and the DEQ, staff with these skills already exist, so this requirement will add little additional cost.

Two pilot programs, one to help improve the efficiency with which the wetland permit application process is executed, and another to help local governments and other

participating organizations develop wetland mitigation banks, will need to be funded.

The DEQ will have to develop a program to facilitate voluntary wetland restoration and conservation projects in coordination with Federal, State, tribal, and nongovernmental groups having a goal of facilitating a net gain in wetland quantity, quality, or both.

Costs associated with the new Wetland Advisory Council will likely include the rent of a venue for the Council to meet, support staff costs, and other minor administrative costs. Council members will not receive compensation for serving on the Council. One of the objectives of the Council will be to determine a proper funding source and funding level for the wetland protection program.

The bill did not take effect unless three criteria were met:

- \$4.0 million was appropriated from the Cleanup and Redevelopment Trust Fund to the Environmental Protection Fund.
- \$4.0 million was appropriated from the Community Pollution Prevention Fund to the Environmental Protection Fund.
- \$2.0 million from the Environmental Protection Fund was appropriated to support the wetland protection program.

(As noted above, these appropriations were made by Public Acts 118 and 240 of 2009.)

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.