Legislative Analysis

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WETLAND PERMITS

House Bill 5441(Substitute H-4)
Sponsor: Rep. John Pastor
Committee: Conservation and Outdoor Recreation
First Analysis (6-22-04)

BRIEF SUMMARY: The bill would amend the Natural Resources and Environmental Protection Act to amend the criteria used by the DEQ in determining whether a wetland permit should be issued.

FISCAL IMPACT: The bill would not have a fiscal impact on the state or on local governmental units.

THE APPARENT PROBLEM:

Part 303 (Wetland Protection) of the Natural Resources and Environmental Protection Act requires individuals to obtain a permit, with certain exceptions, from the Department of Environmental Quality (DEQ) when doing any of the following: (1) depositing or permitting the placement of fill material in a wetland; (2) dredging, removing, or permitting the removal of soil or minerals from a wetland; (3) constructing, operating, or maintaining any use or development in a wetland; and (4) draining surface water from a wetland.

Part 303 specifies that a permit for an activity cannot be approved unless the DEQ determines that issuing the permit would be in the interest of the public, among other criteria. In determining whether the issuance of a permit is in the interest of the public, the DEQ must consider, among other criteria, the availability of "feasible and prudent" alternative locations and methods to accomplish the expected benefits from the regulated activity. Moreover, Part 303 prohibits the DEQ from issuing a permit unless it is shown that there will not be an unacceptable disruption to aquatic resources and the applicant shows that proposed activity is primarily dependant on being located in a wetland and, again, a feasible and prudent alternative does not exist. In addition, the DEQ rules promulgated pursuant to Part 303 further provide that an activity is considered to be primarily dependent on a wetland only if the activity requires a location within a wetland and requires wetland conditions to fulfill its basic purpose.

The DEQ's interpretation of, and actions under, Part 303 have been the subject of many administrative and legal challenges. In testimony presented to the Committee on Conservation and Outdoor Recreation, a landowner on Presque Isle Harbor recounted his nearly four-year struggle with the DEQ to obtain a permit to construct a driveway from what will be his retirement home overlooking Lake Huron to the main road. The planned location of the home is in an upland area that is adjacent to the lakefront, and the projected path for the driveway would have crossed several wetland areas subject to regulation under Part 303, which requires the landowner to acquire a permit from the

DEQ. (The landowner testified in committee that he only planned on constructing a driveway in the wetland and that he has no intention of filling the wetland or otherwise significantly disturb the area.)

The DEQ subsequently denied the permit, and suggested as a "feasible and prudent" alternative that the home be placed closer to the road, thereby no longer requiring the driveway to cut through a wetland. The landowner apparently suggested that if he were to build the home closer to the road, he would subsequently cut down trees in the forested wetland area that block the view of the lake. Apparently, the DEQ was not overly concerned with this proposition. After the permit was denied, the landowner appealed the decision under the Administrative Procedures Act. An administrative law judge sided with the landowner, finding that the construction of the driveway is primarily dependent on it being located in a wetland and that a feasible and prudent alternative did not exist. Despite the ruling of the administrative law judge, the director of the DEQ denied the permit. The landowner then offered an alternative route that would have resulted in a shared driveway with the adjacent property owner and, apparently, would have significantly reduced the impact on the wetland. That plan was rejected by the DEQ, as it continued to believe that its plan to build the home closer to the road was a feasible and prudent alternative. The case is pending before the Oakland County Circuit Court.

Some people believe that this situation involving just one aggrieved property owner highlights several problems with Part 303 and the DEQ's actions under that part, particularly the DEQ's focus solely on the wetland, without regard to other areas. Legislation has been introduced to clarify, in statute, the criteria used by the DEQ to permit an application under Part 303.

THE CONTENT OF THE BILL:

Under Part 303 of the Natural Resources and Environmental Protection, a permit to engage in an activity that impacts a wetland cannot be issued by the Department of Environmental Quality unless, among other requirements, the applicant shows that proposed activity is primarily dependant on it being located in a wetland and that a feasible and prudent alternative does not exist.

The bill would state, instead, that the applicant would have to show that the proposed activity is primarily dependent on it being located in a wetland and clearly show that a feasible and prudent alternative that would have less of an impact on aquatic resources than the proposed activity does not exist. The bill further provides that the following apply in determining the existence of a feasible and prudent alternative: (1) an alternative could mean a different project location, configuration, size, or method that accomplishes the same purpose; (2) an alternative would be considered to be "feasible and prudent" if it is available and capable of being done, after taking into consideration reasonable costs, existing technology, and logistics; and (3) it is presumed that an alternative activity in a location that is not a wetland will have less of an impact on aquatic resources than a proposed activity in a wetland.

MCL 324.30311

BACKGROUND INFORMATION:

Regulated wetlands

Wetlands are regulated by the DEQ if they are (1) connected to one of the Great Lakes or Lake St. Clair; (2) located within 1,000 feet of one of the Great Lakes or Lake St. Clair; (3) located within 500 feet of an inland lake, pond, river, or stream; (4) not connected to any lake, pond, stream or river but are at least five acres in size and are located in a counties with a population of at least 100,000; and (5) not connected to any lake, pond, stream, or river and is less than five acres, but "the department determines that the protection of the area is essential to the preservation of the natural resources of the area…"

Permit application review criteria

The following permit review criteria are provided for in Rule 2a (R. 281.922a) of the DEQ's Part 303 rules.

- The department shall review a permit application to undertake an activity listed in section 30304 of the act according to the criteria in section 30311 of the act.

- As required by subsection 30311(4) of the act, a permit applicant shall bear the burden of demonstrating that an unacceptable disruption to aquatic resources will not occur as a result of the proposed activity and demonstrating either of the following:

- The proposed activity is primarily dependent upon being located in the wetland.

- There are no feasible and prudent alternatives to the proposed activity.

- A permit applicant shall provide adequate information, including documentation as required by the department, to support the demonstrations required by section 30311 of the act. The department shall independently evaluate the information provided by the applicant to determine if the applicant has made the required demonstrations.

- A permit applicant shall completely define the purpose for which the permit is sought, including all associated activities. An applicant shall not so narrowly define the purpose as to limit a complete analysis of whether an activity is primarily dependent upon being located in the wetland and of feasible and prudent alternatives. The department shall independently evaluate and determine if the project purpose has been appropriately and adequately defined by the applicant, and shall process the application based on that determination.

- The department shall consider a proposed activity as primarily dependent upon being located in the wetland only if the activity is the type that requires a location within the wetland and wetland conditions to fulfill its basic purpose; that is, it is wetland-dependent. Any activity that can be undertaken in a non-wetland location is not primarily dependent upon being located in the wetland.

- An alternative is feasible and prudent if both of the following provisions apply:

- The alternative is available and capable of being done after taking into consideration cost, existing technology, and logistics.

- The alternative would have less adverse impact on aquatic resources. A feasible and prudent alternative may include any or all of the following:

    - Use of a location other than the proposed location.

    - A different configuration.

    - Size.

    - The method that will accomplish the basic project purpose.

  The applicant shall demonstrate that, given all pertinent information, there are no feasible and prudent alternatives that have less impact on aquatic resources. In making this demonstration, the applicant may provide information regarding factors such as alternative construction technologies; alternative project layout and design; local land use regulations and infrastructure; and pertinent environmental and resource issues. This list of factors is not exhaustive and no particular factor will necessarily be dispositive in any given case.

- If an activity is not primarily dependent upon being located in the wetland, it is presumed that a feasible and prudent alternative exists unless an applicant clearly demonstrates that a feasible and prudent alternative does not exist.

- Unless an applicant clearly demonstrates otherwise, it is presumed that a feasible and prudent alternative involving a non-wetland location will have less adverse impact on aquatic resources than an alternative involving a wetland location.

- An area not presently owned by the permit applicant that could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity is a feasible and prudent alternative location.

- An alternative may be considered feasible and prudent even if it does not accommodate components of a proposed activity that are incidental to or severable from the basic purpose of the proposed activity.

- An alternative may be considered feasible and prudent even if it entails higher costs or reduced profit. However, the department shall consider the reasonableness of the higher costs or reduced profit in making its determination.

- The department may offer a permit for a modification of an activity proposed in an application if the proposed activity cannot be permitted under the criteria listed in section 30311 of the act and if the modification makes that activity consistent with the criteria listed in section 30311 of the act.

    - The applicant may accept the permit for the modification of the proposed activity by signing it and returning it to the department within 30 days of the date

of the offer. The permit shall be considered issued upon countersignature by the department.

• The permit application is considered denied if the applicant does not sign and return the permit for the modification of the proposed activity to the department within thirty days of the date of the offer. The permit applicant may then appeal the denial pursuant to sections 30307(2) and 30319(2) of the act.

• The date on which the modification is offered shall be considered the date of the department's approval or disapproval of the application pursuant to section 30307(2) of the act.

ARGUMENTS:

For:

The situation described earlier concerning Presque Isle Harbor suggests that statutory changes are needed in the DEQ's wetland permitting process. (The situation was described by the aggrieved landowner, although the DEQ did not rebut anything that he had stated.) The chief criticism in that case has been that the DEQ has repeatedly denied the permit (notwithstanding the determination of the administrative law judge that the DEQ should approve the permit), relying largely on its insistence that its plan to relocate a private home closer to the road is a "feasible and prudent" alternative. When the landowner expressed his apparent intent to clearcut the forested wetland blocking his view of the harbor, if he were forced to go along with the DEQ's alternative, the DEQ reportedly showed no concern. This is clearly a problem as the DEQ appeared to be more concerned with a small portion of wetland that would be disturbed by the construction of a driveway than by the landowner clearcutting a larger section of forested wetland. The bill, by re-iterating the presumption that an alternative activity in a location that is not a wetland will have less of an impact on aquatic resources than the proposed activity in a wetland, seeks to strike a balance in assessing the effects of the regulated activity. This, in a manner of speaking, makes the department focus on other biological and ecological impacts, instead of solely looking at the impact on a wetland.

In addition, and perhaps more importantly, the bill explicitly requires the DEQ to issue a permit if an applicant shows that an activity is primarily wetland-dependent and that a feasible and prudent alternative that has less of an impact on aquatic resources does not exist. Current law provides that a permit may not be issued unless those two criteria are met, but it does not require the permit to be issued when the criteria exist. In the situation that prompted the bill, an administrative law judge found that the project was wetland-dependent and that a feasible and prudent alternative did not exist. The landowner met the criteria under Part 303 and yet the DEQ still denied the permit.

Response:

Is it wise to legislate based on a limited number of cases of conflict between the DEQ and property owners? It should be noted that, according to committee testimony, approximately 98 percent of all wetland permit applications are approved by the DEQ.

Against:

With the exception of the "shall issue" language, it is not entirely clear how the bill improves upon current law. The House Committee on Conservation and Outdoor Recreation heard a great deal of testimony from the aggrieved landowner about the problems with the DEQ and its actions under Part 303. If the DEQ can in fact deny a permit in an arbitrary and capricious manner while following the provisions of Part 303 and the corresponding rules, then the statute and rules must be changed. But instead of fundamentally changing the law, the bill reinforces it, by largely placing current administrative rules into statute. How does that improve upon the current situation?

Additionally, a definition of what constitutes a "feasible and prudent" alternative needs to be added to the statute. Current administrative rules state that an alternative is feasible and prudent if (1) the alternative is available and capable of being done after taking into consideration cost, existing technology, and logistics; and (2) the alternative would have less adverse impact on aquatic resources. The rules further specify that a feasible and prudent alternative could mean the use of a location other than the proposed location, a different configuration, a different size, or an alternative method that will accomplish the basic project purpose. [The bill largely places this language into statute.] But in the case that prompted the bill, one should ask whether the DEQ's proposed alternative to site the house closer to the road even meets these criteria. Some have suggested that, in this situation, the DEQ overstepped its bounds by effectively requiring the landowner to build the home closer to the road, if he wanted a driveway. What is so troublesome to some about this is that the construction of the home was not dependent on a wetlands permit from the DEQ. The construction of the driveway, *not the construction of the home*, was the activity regulated under Part 303. It is believed that the DEQ should not even have concerned itself with the placement of the home; it should have only been concerned about the construction of the driveway, and sought ways to mitigate any impact on the wetlands. In this regard, the DEQ's alternative plan wasn't even reasonable, much less feasible and prudent.

Against:

There is some concern that the "shall issue" language in the bill will (according to the federal Environmental Protection Agency and not just the DEQ) likely result in the inability of the DEQ to administer the federal wetlands program under Section 404 of the Clean Water Act. That section regulates the placement of fill in the waters of the U.S., including wetlands, and requires a permit from the U.S. Army Corps of Engineers for dredge and fill activities in wetlands and other waters. The state is one of only two states (the other being New Jersey) that administers the federal program. For the state to administer the program, which it has done since 1984, its program must generally be consistent with the federal Clean Water Act. The act permits a state to administer its own permit program in lieu of a federal permit program. If the state's law differs significantly from the federal law (as it would if it adopted the "shall-issue" language), the state permit would no longer take the place of a federal permit, and a federal permit would still be required. This change would not eliminate the role of the DEQ and the need for state permit, but would require individuals to now also seek a permit from the Army Corp of Engineers. If residents think working through a maze of state statutes and regulations is difficult, navigating federal law and regulations could be even worse. Moreover state oversight for the program would drop significantly.

As a case in point, this bill was prompted by the concerns of at least one vocal constituent, and efforts were made by legislators to work with the DEQ and seek a remedy. If there are problems with the law, it can be more easily addressed here in Michigan than in Washington. State legislators and residents have a better opportunity to address problems if it continues to be administered at the state level. Those who are concerned with protecting people from an overly burdensome government permitting program should take steps to ensure that the federal program continues to be administered by the DEQ (regardless of one's opinion on the department's performance). The bill goes against the recent trend of the legislature to find ways to improve the permitting process and, ultimately, the business climate of the state. This bill, through the "shall issue" language, does not cut red tape (because the DEQ would still issue state permits pursuant to Part 303), it just creates more of it. It would require individuals and businesses to obtain two permits and deal with two regulatory agencies.

Moreover, the principal problem with current law and rules appears to be the DEQ's idea of what constitutes a feasible and prudent alternative, and the DEQ's continued insistence that a landowner go along with that alternative. The "shall issue" language is dependent on a finding that a feasible and prudent alternative does not exist. If the permit applicant and the DEQ cannot come to an agreement on whether a feasible and prudent alternative exists, the "shall issue" language does not even matter. In all actuality, the "shall issue" language has the potential to create a larger problem than the one it purports to solve.

POSITIONS:

The Department of Environmental Quality opposes the bill, particularly the "shall issue" language. (6-17-04)

The Michigan Environmental Council opposes the bill, particularly the "shall issue" language. (6-16-04)

The Michigan Association of Homebuilders has concerns about putting rules into statute about the possibility of the state program falling out of compliance with federal requirements. (6-22-04)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.