Legislative Analysis

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AGRICULTURAL POLLUTION REGULATION

House Bill 5711 (Substitute H-6)
Sponsor: Rep. John Proos

House Bill 5712 (Substitute H-4)
Sponsor: Rep. Darwin Booher

House Bill 5713 (Substitute H-4)
Sponsor: Rep. Leslie Mortimer

House Bill 5714 (Substitute H-5)
Sponsor: Rep. John Stahl

House Bill 5715 (Substitute H-1)
Sponsor: Rep. Neal Nitz

House Bill 5716 (Substitute H-1)
Sponsor: Rep. Phil Pavlov

House Bill 6219 (Substitute H-2)
Sponsor: Rep. Brian Palmer

House Bill 6220 as introduced
Sponsor: Rep. Brian Palmer

Committee: Agriculture
First Analysis (7-13-06))

BRIEF SUMMARY: House Bills 5711–5714 and 6219 would create a new Part 86 (Agriculture) of the Natural Resources and Environmental Protection Act. **House Bill 5711** would exempt MAEAP-verified farms from criminal and civil penalties under NREPA-Part 31 for violating state water quality standards. **House Bill 5712** would allow MAEAP-verified livestock production facilities to register with the MDA and be exempt from the permit requirements of NREPA-Part 31. **House Bill 5713** would require the DEQ to develop a pamphlet describing the environmental laws affecting agriculture. **House Bill 5714** would prohibit the DEQ from acting upon anonymous complaints and would permit the DEQ to assess costs against a person who brings more than three unverified complaints within three years. **House Bills 5715** and **5716** would transfer authority over nonpoint source pollution prevention projects concerning agriculture from the DEQ to the MDA**. House Bill 6219** defines key words and phrases used in Part 86. **House Bill 6220** would give first priority for nonpoint source pollution prevention grants to water quality monitoring projects in watersheds with a high concentration of livestock production facilities. House Bills 5711-5714 and 6219 are tie-barred to each other. House Bills 5715 and 5716 are tie-barred to each other.

FISCAL IMPACT: The Department of Agriculture estimates that the bills would require an additional $720,000 for additional staffing necessary to meet the bills' demands on the MAEAP program. (See the section below on "Fiscal Implications" for further detail.)

THE APPARENT PROBLEM:

The Michigan Agricultural Environmental Assurance Program (MAEAP) was created in May 1998 by a coalition of agricultural, environmental, and conservation groups, with the purpose of assisting farmers in taking a voluntary, proactive approach to reducing agricultural pollution. The program is actually an outgrowth of the Pollution Prevention

Strategy for Michigan Agriculture developed by an agricultural pollution task force and jointly endorsed by the Department of Agriculture (MDA) and Department of Environmental Quality (DEQ) in 1997. Among other things, the pollution prevention strategy and the accompanying implementation plan called on the agricultural industry to create environmental assurance program to complement the existing Right to Farm Program, stating "the purpose is to create a proactive movement by agriculture to become more involved in adopting environmental stewardship practices on the farm." The benefit of such a program, it was noted, was that it was a preventative approach, rather than remediation; provided an alternative to federal permit requirements; and would encourage the development of low cost solutions to environmental pollution.

The MAEAP has three stages designed to provide the farmer with flexibility to meet specific goals for a farming operation. The first phase of the program is an educational program (5-7 hours) designed to raise a farmer's awareness of practices that reduce legal and environmental risks associated with the farming operation. Once the first phase is completed, a farmer completes an on-farm assessment and develops a management plan specific to his or her farm. After the management plan is approved and implemented, the next phase is third-party verification. At the farmer's request, the Department of Agriculture completes an on-site inspection and verifies that the management plan has been implemented according to schedule. Farmers that complete the necessary requirements of the program receive a certificate that recognizes their accomplishment and commitment to sound environmental stewardship.

The MAEAP focuses on three main components of a farming operation: (1) livestock, (2) farmstead, and (3) cropping (growing crops). The livestock component includes the development and implementation of a Comprehensive Nutrient Management Plan (CNMP), which is a planning tool that helps the farmer comply with the Generally Accepted Agricultural and Management Practices (GAAMPs), particularly those related to manure management. The purpose of the CNMP is to protect water quality, obtain beneficial uses from animal manure and organic by-products, and minimize the farming operation's adverse impacts on the environment and public health.

The farmstead component is designed to assist the farmer in addressing the environmental risks around a farmstead, such as how the storage and handling of pesticides or manure are impacting water supplies. The cropping component focuses on the environmental impacts of activities related to field cropping.

Public Act 176 of 2001 created Part 82 (Conservation Practices) of the Natural Resources and Environmental Protection Act, which provides the Department of Agriculture with statutory authority to administer the MAEAP and the Conservation Reserve Enhancement Program (CREP). Part 82 does not create MAEAP and CREP specifically, but rather permits the Department of Agriculture to establish conservation programs designed to encourage farmers to voluntarily implement practices that protect and conserve water quality, soil, natural features, wildlife, or other natural resources. Discussion of the legislation at the time it was enacted focused on MAEAP and CREP.

The lack of specificity in law has reportedly created a barrier to getting farmers to enroll in the program. The process of developing a CNMP and becoming MAEAP-verified can be costly. Given the economics of farming, many farmers would be willing to enroll in were it not for the requisite cost and the program's somewhat shaky legal ground. Some believe that a stronger legal basis and the creation of certain incentives can encourage farmers to enroll in the MAEAP and take a proactive step toward addressing environmental concerns on their farming operations.

Additionally, there has been a growing concern within the agricultural community that the environmental standards and regulations administered by the Department of Environmental Quality as they relate to farming operations are, at best, a "moving target." This results, critics say, in a situation where compliance with the law one day, can mean noncompliance the next. Beyond understanding the requirements, farmers must take the necessary action to comply with them. Industry representatives say that it takes a substantial investment of time and money to develop farming practices that comply with state environmental standards. If those standards are changing or unclear, farmers cannot reasonably take the appropriate actions to manage their operations in an environmentally or economically sustainable manner. Many in the agricultural community would like better assurance that enrollment in MAEAP demonstrates a farmer's good faith effort to comply with state environmental standards. Legislation aimed at doing this has been introduced.

THE CONTENT OF THE BILLS:

House Bill 5711

The bill would amend the new Part 86 (Agriculture) of the Natural Resources and Environmental Protection Act – created in HB 6219 – to exempt MAEAP-verified farms from criminal or civil penalties for violating state water quality standards

Specifically, the bill provides that irrespective of any other provisions in the act or related rules, if a farm or farming operation is verified under the Michigan Agricultural Environmental Assurance Program, the farm or farming operation would be not be considered to have caused an impairment of the natural resources of the state, unless the water quality data or results from a water quality study conclusively show that the farm or farming operation caused a receiving body of water to exceed state water quality standards.

If the farm or farming operation is MAEAP-verified and is operated in conformance with MAEAP verification standards, any precipitation-related discharge of manure would be considered to be an “agricultural storm water discharge."

If water quality data conclusively shows that an agricultural stormwater discharge caused a body of water to exceed state water quality standards, the owner or person responsible for the farm or farm operation would <u>not</u> be subject to civil or criminal penalties under Part 31 (Water Resources Protection) of the NREPA. However, the owner or responsible

person would have to work with the Department of Agriculture to review the farm's site-specific nutrient management plan (devised under the provisions of the MAEAP program) and make necessary changes. If the owner does not agree to make the changes, the MDA would terminate the farm's MAEAP verification status after providing 60 days' advance notice.

House Bill 5712

The bill would add a provision to Part 86 of NREPA allowing livestock production facilities to register with the Department of Agriculture (MDA) and be exempt from the permitting requirements of Part 31 of the act.

An existing or expanding facility would be allowed to register if it is verified under the MAEAP livestock system and has not had a discharge of waste or waste effluent into the waters of the state within the previous five years, other than an agricultural storm water discharge. A new facility would be allowed to register if the following criteria are met: (1) before construction, the facility provides the MDA with a notice of its intent to register; (2) before the facility is populated, the owner or operator obtains a determination of conformance with the *Generally Accepted Agricultural Management Practices (GAAMPs) for Site Selection and Odor Controls at New and Expanding Animal Livestock Facilities*; and (3) within 30 days after the facility is populated, the owner requests verification under the MAEAP livestock system.

The registration would be revoked if the DEQ determines that the facility discharged waste or waste effluent into the waters of the state, other than an agricultural storm water discharge, or was not verified under MAEAP livestock system within one year of being populated. The MDA could extend the one-year registration deadline if the facility makes progress toward verification. Once the registration is revoked, the facility would be required to apply for a permit under Part 31 within 30 days.

House Bill 5713

The bill would add a provision to Part 86 requiring the DEQ to prepare a booklet identifying environmental laws and rules affecting farms and farming operations, and make copies available by January 1, 2007.

Additionally, the bill would require the department to develop reasonable approaches to meeting the requirements of the laws identified in the booklet.

House Bill 5714

The bill would add a provision to Part 86 prohibiting the DEQ from acting on a complaint unless the complainant provides the department with his or her name and address. If a complainant brings three or more unverified complaints against the same farm or farming operation within three years, the complainant could be required by the DEQ director to pay the investigation costs of any fourth or subsequent unverified complaint brought

against the same farm or operation. An "unverified complaint" would be a complaint in response to which the DEQ director determines the farm or farm operation is using Generally Accepted Agricultural and Management Practices.

House Bill 5715

The bill would amend Part 88 (Water Pollution and Environmental Protection Act) and Part 196 (Clean Michigan Initiative Implementation) of NREPA to transfer authority over nonpoint source pollution and prevention grants concerning agriculture from the DEQ to the MDA. The DEQ would retain authority over non-agricultural grantees.

House Bill 5716

The bill would amend Part 53 (Clean Water Assistance) of NREPA to transfer authority over agricultural nonpoint source projects from the DEQ to the MDA. The DEQ would retain authority over non-agricultural projects.

House Bill 6219

The bill would create a new Part 86 (Agriculture) of the Natural Resources and Environmental Protection Act, and changes the name of Part 23 from "Agriculture and the Environment" to "Agriculture and Rural Communities Roundtable."

The bill contains definitions of various terms used throughout Part 86. Of note, "agricultural storm water discharge" (used in HB 5711 and HB 5712) is defined to mean a precipitation-related discharge from a farm or farm operations that, at the time of the discharge, is verified under the MAEP and managed in accordance with the site-specific nutrient management plan approved under that verification.

Additionally, the MAEAP program is defined to mean a three-phase program that meets the following requirements: (1) is designed by the MDA, DEQ, federal agencies, farm owners and operators, and industry representatives; (2) was originally recommended by the Michigan Agriculture Pollution Prevention Implementation Plan; (3) consists of education, of-farm risk assessment, and third party verification by the MDA; (4) focuses on livestock, cropping, and farmstead systems; and (5) is designed to help local farms and farm operations voluntarily prevent of minimize agricultural pollution risks.

House Bill 6220

The bill amends Part 88 to specify that first priority for grants awarded under the part would be given to water quality monitoring projects in watersheds with a high concentration of livestock production facilities.

BACKGROUND INFORMATION:

Right to Farm Act

Generally speaking, environmental complaints concerning a farming operation are remedied through the Right to Farm Act, Public Act 93 of 1981. The act specifies that activities at a farm are subject to the applicable provisions of the Natural Resources and Environmental Protection Act, and further requires that the investigation and resolution of environmental complaints against farms be conducted in accordance with a memorandum of understanding (MOU) entered into between the Department of Agriculture and the Department of Environmental Quality. The act is primarily administered by the MDA, with the MDA generally having the first opportunity to investigate a complaint and determine conformance with GAAMPs. If a complaint is verified (that is, an environmental problem exists and is attributable to the farmer's agricultural management practices), the farmer must take the necessary actions to bring the farm in conformance with GAAMPs. Often this includes working with the local MSU-Extension office, the local Conservation District, or USDA-Natural Resources Conservation Service (NRCS).

The DEQ's Water Bureau investigates complaints concerning water quality where there is a discharge or high potential for discharge. If the DEQ determines there is a discharge or high potential for a discharge, based on information contained in a complaint, it will immediately conduct an on-site investigation. Generally, MAEAP staff should accompany, or consult, Water Bureau staff when investigating a complaint concerning farms that are MAEAP-verified or actively pursuing verification. Based on the findings of an investigation, the DEQ, in conjunction with the MDA, makes a decision regarding whether any corrective or enforcement actions are necessary to remedy a problem. The DEQ often refers a farm to the MDA for technical assistance in resolving the problem.

The act further authorizes the Agriculture Commission to develop and adopt Generally Accepted Agricultural and Management Practices for farms and farm operations, and provides that farms conforming to those GAAMPs shall not be found to be a nuisance. The commission, in cooperation with industry experts, has developed GAAMPs on the following subjects:

- Manure Management and Utilization
- Site Selection and Odor Control for New and Expanding Livestock Production Facilities
- Pesticide Utilization and Pest Control
- Care for Animals
- Nutrient Utilization
- Irrigation Water Use
- Cranberry Production

Generally, the GAAMP for Manure Management and Utilization is intended to assist farmers in developing manure management practices that seek to avoid surface water and

groundwater pollution. Through the MAEAP program, farmers develop a Comprehensive Nutrient Management Plan designed to help farmers comply with GAAMPs. Among a multitude of guidelines, the GAAMP notes that (1) with certain exceptions, manure should not be applied within 150 feet of surface waters or areas subject to flooding; (2) liquid manure applications should be managed in a manner to optimize nutrient utilization and not result in ponding, soil erosion losses, manure runoff to adjacent property, drainage ditches, or surface water; and (3) application of manure to frozen or snow-covered land should be avoided.

The GAAMP for Site Selection and Odor Control for New and Expanding Livestock Production Facilities is intended to provide assistance in determining the suitability of sites for livestock production facilities. The Department of Agriculture reviews the suitability of a potential site and determines whether the facility and siting request conform to the GAAMP. The owner of the production facility, a neighbor, or the local unit of government that disagrees with the decision of the MDA, may request that the Agriculture Commission review that decision.

Copies of the GAAMPs are available through the state's website at www.michigan.gov/gaamps.

Federal National Pollution Discharge Elimination System (NPDES) Regulations

In 1972, the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), was substantially amended to prohibit the discharge of any pollutant from a "point source" into the navigable waters of the U.S., except as authorized pursuant to a National Pollutant Discharge Elimination System (NPDES) permit. Relevant to these bills, the CWA (33 U.S.C. 1362) defines "point source" to mean any discernible, confined, and discrete conveyance from which pollutants are or may be discharged including, among other things, a concentrated animal feeding operation (CAFO). The act specifically excludes from the definition of "point source" agricultural stormwater discharges. Additionally, while CAFOs are considered to be a point source, most other agricultural operations are considered to be “nonpoint” sources and, therefore, are exempt from the permitting and compliance requirements of the CWA and related rules.

Following the 1972 CWA amendments, regulations were promulgated in the mid-1970s to require an NPDES permit for CAFOs, as required under the CWA. However, over the course of the next quarter century, a number of problems concerning these regulations emerged. Recent reports by both the Government Accountability Office and the Congressional Research Service note that despite the federal regulations concerning CAFOs, state and federal oversight of these operations was rather limited, which essentially allowed unregulated discharges from animal feeding operations to occur. Historically, the primary emphasis of states and the EPA, as it relates to the NPDES permits, has been on traditional point sources, such as industrial and municipal waste facilities. It has only been in recent years, as pollution from traditional point sources was reduced, that the states and the EPA have begun to focus their attention on agricultural feeding operations.

Additionally, the regulations failed to keep up with the changing technology and management practices concerning the livestock industry. Over the years livestock operations have become more concentrated – i.e., there are fewer, but larger operations, with more intensive production methods. In some instances, the amount of manure nutrients generated from these types of operations exceeds the assimilative capacity of surrounding land, causing surface and groundwater contamination and resulting in environmental and public health concerns.

In late 2000, following litigation brought by the Natural Resources Defense Council against the EPA, the Clinton administration began the process to revise and update the CWA's CAFO regulations. Final rules were promulgated by the Bush administration in December 2002 and published in the *Federal Register* on February 12, 2003.

The rules (40 CFR 122.23) generally provide that all CAFOs are considered to be point sources that require an NPDES permit for any discharge or potential discharge. All CAFO owners and operators are required to seek coverage under an NPDES permit, except where there is no potential to discharge, as determined by the EPA. A CAFO may not be considered to have "no potential to discharge" if it has had a discharge in the five years prior to its request for a "no potential to discharge" exemption.

The rule, however, also provides an exemption from the permitting requirements for precipitation-related agricultural storm water discharges, as provided in the Clean Water Act. (See below for more detail.)

Under the rules, an animal feeding operation is considered to be a large CAFO subject to the CWA's permitting requirements if it meets the following criteria:

- Animals (other than aquatic animals), have been, are, or will be stabled or confined and fed or maintained for at least 45 days in any 12-month period.
- Crops vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
- The animal feeding operation stables or confines the following animals:
    - 700 mature dairy cows, whether milked or dry
    - 1,000 veal calves
    - 1,000 cattle other than mature dairy cows or veal calves
    - 2,500 swine each weighing at least 55 pounds
    - 10,000 swine each weighing less than 55 pounds
    - 500 horses
    - 10,000 sheep or lambs
    - 55,000 turkeys
    - 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system
    - 125,000 chickens (other than laying hens), if the AFO uses a manure management system other than a liquid manure handling system
    - 82,000 laying hens, the if the AFO uses a manure management system other than a liquid manure handling system

- 30,000 ducks, if the AFO uses a manure handling system other than a liquid manure handling system
- 5,000 ducks, if the AFO uses a liquid manure handling system.

Federal regulations (40 CFR 122.42) further provide that any permit issued to a CAFO must include (1) requirements to develop and implement a nutrient management plan; (2) record keeping requirements; (3) requirements relating to the transfer of manure or process wastewater to other persons; and (4) annual reporting requirements. The regulation provides that the nutrient management plan must, among other things, do the following: (1) identify appropriate site specific conservation practices to be implemented; (2) identify protocols for appropriate testing of manure, litter, process wastewater, and soil; (3) establish protocols to land apply manure, litter, or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients; and (4) identify specific records that will be maintained to document the implementation of the nutrient management plan.

Waterkeeper Alliance v. Environmental Protection Agency

Following promulgation, the new CAFO rules were challenged by a number of environmental organizations (Waterkeeper Alliance, Natural Resources Defense Council, Sierra Club, and the American Littoral Society) and a number of agricultural organizations (American Farm Bureau Federation, National Pork Producers Council, and the National Chicken Council). In a consolidated decision, the federal Court of Appeals (2nd Circuit) held that many provisions in the new CAFO rules violated the Clean Water Act or were otherwise arbitrary and capricious under the federal Administrative Procedures Act. Accordingly, the court vacated certain provisions and ordered the EPA to provide further clarification and analysis on other provisions.

The environmental groups argued that the CAFO rules, by failing to provide permitting authorities (states, generally) the authority to review nutrient management plans, violated the CWA and was arbitrary and capricious under the APA. The court agreed with this point, and vacated that provision.

Additionally, the agricultural groups argued that the CAFO rule's "duty to apply" for all CAFOs, except where there is "no potential to discharge" violated the CWA Act. The court agreed with this point, stating "unless there is a 'discharge of any pollutant.' there is no violation of the act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." This provision was also vacated by the court.

The court's decision in *Waterkeeper Alliance v. Environmental Protection Agency* may be found at http://caselaw.lp.findlaw.com/data2/circs/2nd/034470pv2.pdf.

Proposed Revised Rules

The EPA recently issued a proposed set of regulations addressing the *Waterkeeper* decision that, among other things, would eliminate the "duty to apply" provisions in the 2003, including the "no potential to discharge" determination, and instead require that all CAFOs that discharge or propose to discharge to obtain an NPDES permit. This requirement would apply to all CAFO owners and operators irrespective of the volume or duration of the discharge, except for agricultural stormwater discharges.

The proposed regulations also aim to further clarify the agricultural storm water exemption. Under the proposed regulations, large CAFOs that have only agricultural stormwater discharges from their land application area, and no other discharges or proposed discharges from their production or land application area, would no longer be required to seek permit coverage. However, precipitation-related discharges from CAFO land application areas would be considered agricultural storm water only where the CAFO land applied in accordance with nutrient management practices that meet certain requirements. The proposed regulation further states, "EPA believes that, in order for the owner or operator of a CAFO to qualify for the statutory agricultural stormwater exemption, manure, litter, and process wastewater must be applied in compliance with technical standards that are, in significant part, intended to ensure the appropriate agricultural utilization of the nutrients contained in the manure, litter, and process wastewater".

Michigan NPDES Regulations

A Brief History

The state began issuing NPDES permits for CAFOs only in recent years. Generally speaking, the Engler administration favored a voluntary approach to regulating agricultural operations, relying on the Right to Farm Act and Generally Accepted Agricultural and Management Practices. This position was further strengthened by the development in 1997 of the Pollution Prevention Strategy for Michigan Agriculture and, in the following year, the development of the Michigan Agricultural Environmental Assurance Program (MAEAP). The pollution prevention strategy stated, "The Michigan Right to Farm Act was identified as an excellent foundation from which to build an improved nonpoint source pollution prevention program. Emphasizing the water quality benefits achieved by following the Generally Accepted Agricultural and Management Practices (GAAMPs) will provide an effective vehicle for implementing widespread pollution control measures. The Right to Farm GAAMPs should become a key coordinating mechanism for pollution prevention efforts." The strategy further stated, "the regulatory agencies [MDA and DEQ] must recognize that compliance with GAAMPs represents a good faith effort to comply with environmental requirements, and take this into consideration in any regulatory or enforcement actions."

In addition, the administration and the agricultural community generally believed that the state's zero discharge policy effectively rendered an NPDES permit for confined animal

feeding operations unnecessary, and that the MAEAP, through educational workshops, on-site evaluations, and site specific management plans, better met the needs of farmers, yet still maintained protection of the environment.

Despite the state's zero discharge policy and overall pollution prevention strategy, including the MAEAP, many environmental groups asserted that the state failed to take appropriate enforcement action against large animal feeding operations where discharges had actually occurred. In November 1999, the Sierra Club (Mackinac Chapter), Michigan Environmental Council, Michigan Land Use Institute, and two individuals petitioned the EPA to withdraw the state's delegated authority under the Clean Water Act to administer the NPDES program. Under federal regulations, the EPA may withdraw a state's authority to administer the NPDES program if it no longer complies with the NPDES requirements and it fails to take corrective action. The petition asserted that the request for withdrawal was necessary because the state was "failing to meets its nondiscretionary obligations under the Clean Water Act and [was] pursuing an aggressive course of resistance to either correcting existing problems or implementing reasonable regulatory standards." It was also asserted that under the Memorandum of Understanding in place at that time, (1) investigations could occur only as a result of complaints, (2) complaints must be referred to the MDA, which would first seek voluntary compliance with GAAMPs, and (3) if the there is no violations of the GAAMPs, the DEQ does not conduct an investigation.

As a result of the petition, the EPA conducted an informal investigation of the state's NPDES program. In September 2000, the EPA issued an interim report of its findings in the investigation, finding the state's NPDES compliance evaluation and enforcement program to be "seriously lacking in several respects." To allay these concerns, the EPA held that the DEQ must (1) improve its control over CAFOs by identifying those that are subject to NPDES regulation and determining compliance with the duty to apply for an NPDES permit; (2) establish and implement a program for periodic inspection of permitted CAFOs and known but unpermitted CAFOs; (3) improve enforcement regarding unpermitted discharges and the failure to apply for an NPDES permit; (4) improve responses to citizen complaints alleging an unpermitted discharge; and (5) revise the NPDES permit application form and procedures so that CAFOs apply for NPDES permits as required under state administrative rules.

Following promulgation of the revised federal CAFO rules, the DEQ began the process of revising the state's CAFO rules in April 2004. The new rule (R 323.2196) requires existing CAFOs and animal feeding operations that are later designated as a CAFO that have not had a regulated discharge since January 14, 2000 to apply for coverage under an NPDES general permit or an "equivalent document approved by the department" by September 1, 2005 or within 90 days after notification of the permit requirement, whichever is sooner. Newly constructed CAFOs are required to obtain an NPDES permit at least 180 days prior to beginning operation. All CAFOs that are operating under an equivalent document approved by the DEQ are required to obtain an NPDES permit by January 1, 2007. An owner or operator of a CAFO is not required to obtain a permit, however, if the department makes a determination that the CAFO has "no potential to

discharge" any production area waste or process wastewater. Such a determination will not be made if, among other criteria, the CAFO has had a discharge within the previous five years.

Under the rules, a "regulated discharge" is (1) a discharge that causes or contributes to a violation of state water quality standards; (2) a discharge from the process or production area due to precipitation events, except the discharge of uncontaminated runoff that does not come into contact with any animals, animal waste, or production area waste; or (3) a dry-weather discharge, including an accidental release. In support of a "no potential to discharge" determination, the CAFO owner or operator may include documentation showing that the operation is MAEAP-verified. The "no potential to discharge" determination does not, however, relieve the CAFO from the consequences of an actual discharge. Further, any unpermitted CAFO that discharges pollutants into the waters of the state is in violation of the NREPA, even if it has obtained a no potential to discharge determination from the DEQ. The rules further provide that CAFO NPDES permits must include a requirement that the CAFO owner or operator develop a comprehensive nutrient management plan (CNMP).

State NPDES CAFO Permits

On January 14, 2002, one day before the EPA was to issue a final report assessing the state's NPDES CAFO program, the state agreed to issue NPDES permits for CAFOs. The state's CAFO plan required animal feeding operations with at least 1,000 animal units that had a regulated discharge within the previous two years to obtain a NPDES CAFO general permit, and provided animal feeding operations that had not had a regulated discharge within the previous two years with the option of becoming MAEAP-verified or applying for an NPDES CAFO general permit. Animal feeding operations choosing the MAEAP option had until September 1, 2005 to file a letter of intent with the DEQ. The state's CAFO plan, with the option to enroll in the MAEAP as an alternative to the permitting requirements, was developed under a regulatory innovation agreement through a joint project of the EPA and the Environmental Council of the States (ECOS), generally known as the ECOS Agreement. At present, the ECOS Agreement expires in December 2007.[1] (According to a representative of the Mackinac Chapter of the Sierra Club, the state's agreement to issue a permit largely satisfied the concerns raised in their petition to withdraw the state's NPDES program authority, as well as concerns of the EPA, although some issues remained.)

The ECOS Agreement, however, only applied to existing large CAFOs, and on February 27, 2004, the DEQ issued a Final Determination setting forth the permitting requirements for newly constructed CAFOs. The revised permit requirements also reflected recent changes to the federal NPDES CAFO regulations. Under the revised permit plan, large CAFOs (described above in the federal regulations) were required to apply for an individual permit if (1) a large CAFO is constructed to stable or confine at least two times

[1] The DEQ has noted that as part of the ECOS Agreement, it must conduct an evaluation of the program to determine whether the level of environmental protection accomplished under the project is equivalent to or exceeds what would otherwise be accomplished under the traditional permitting approach.

(1,400 mature dairy cows, for example) the number of animals that define a CAFO; or (2) a CAFO will expand to confine at least 3.5 times (2,450 mature dairy cows, for example) over a five year period; and (3) the CAFO has open manure and wastewater storage structures or land applies manure. All other large CAFOs were required to apply for a general permit.

Last year, the DEQ rewrote the NPDES General Permit for CAFOs. Beginning September 1, 2005, new and existing CAFOs must seek coverage under this latest permit. However, CAFOs that are currently covered under either of the two previous permits do not need to obtain coverage under the latest permit until the current permit expires.

The current permit generally provides that while the permit is in effect (through April 2010), the permit holder is authorized to discharge the following, *provided that the discharge does not cause or contribute to a violation of the state's water quality standards*:

- CAFO process wastewater, manure, or production area overflow, when all of the following are met:
  - Storage structures are properly designed, constructed, operated, and maintained;
  - Either chronic or catastrophic precipitation events cause an overflow of the storage structures to occur; and
  - The production area is operated in accordance with the requirements set forth in the permit.
- Runoff from precipitation events from land application areas and non-production areas that are managed in accordance with the nutrient management plan.

The permit also requires CAFOs to have waste storage structures in place and operational that are designed, constructed, maintained, and operated to contain the total combined volume of the following:

- CAFO process wastewater, manure, or production area waste generated from the operation in, at least, a six-month period.
- All production area waste from the rainfall event size specified below
  - For cattle, horses, and sheep, and existing swine, poultry, and veal, the 25-year, 24-hour rainfall event.
  - For new swine, poultry, and veal, the 100-year, 24-hour rainfall event.

NPDES Exemption for Agricultural Stormwater Discharges

House Bill 5711 provides that if a farm or farming operation is MAEAP-verified and is operated in conformance with MAEAP verification standards, any precipitation-related discharge of manure would be considered to be an “agricultural storm water discharge," and the farmer would not be subject to civil or criminal penalties under Part 31 of NREPA if water quality data conclusively shows that an agricultural stormwater discharge caused a body of water to exceed state water quality standards. Additionally,

House Bill 5712 provides that if a MAEAP-verified farm that is registered has a discharge, its registration would be revoked at it would be required to obtain an NPDES permit under NREPA-Part 31. Generally speaking, the bills incorporate a similar exemption found in existing federal law and regulations.

The definition of "point source" within the Clean Water Act, specifically includes a concentrated animal feeding operation, but excludes an agricultural stormwater discharge. While the act itself does not define what an agricultural stormwater discharge is, the EPA's 2003 revised regulations discuss how these seemingly conflicting provisions work together. [The agricultural stormwater exemption was added to the definition of "point source" in 1987 with the enactment of Public Law 100-4.]

40 CFR 122.3(e) provides that the discharge of any pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in 40 CFR 122.23, do not require an NPDES permit. [The state's CAFO regulations (R 323.2189) adopt 40 CFR 122.3(e) by reference.]

40 CFR 122.23 provides that the discharge of manure, litter, or process wastewater to the waters of the U.S. from a CAFO as a result of land application is a discharge that is subject to the NPDES permitting requirements, except for an agricultural stormwater discharge. The regulation further provides that an agricultural stormwater discharge is a precipitation-related discharge of manure, litter, or process wastewater if that manure, litter, or process wastewater has been applied in accordance with site specific management practices that ensure appropriate agricultural utilization of nutrients. To this point, the preamble to the revised regulations states, "When manure or process wastewater is applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, it is a beneficial agricultural production input. This fulfills an important agricultural purpose, namely the fertilization of crops, and it does so in a way that minimizes the potential for a subsequent discharge of pollutants to waters of the U.S. EPA recognizes that even when manure, litter, or process wastewater is land applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, some runoff of nutrients may occur during rainfall events, but EPA believes that this potential will be minimized and any remaining runoff can reasonably be considered an agricultural storm water discharge." However, the rule notes that discharges from the production area – for example, the feedlot and lagoons – are not eligible for the stormwater exemption.

The agriculture stormwater discharge provision contained in federal regulations was also challenged in the *Waterkeeper Alliance* case. Environmental groups challenged this provision, asserting that it violates the Clean Water Act and is otherwise arbitrary and capricious under the federal Administrative Procedures Act because the CWA's definition of "point source" requires regulation of all CAFO discharges, notwithstanding the agricultural stormwater exemption. The court rejected this claim, finding the relevant provisions of the CWA to be "self-evidently ambiguous as to whether CAFO discharges

can ever constitute agricultural stormwater" and that the EPA's rule was, in fact, a "permissible construction" of the CWA. The court relied on an earlier decision that held that discharges from an area under control of a CAFO can either be a discharge subject to regulation or an agricultural stormwater discharge exempt from regulation. The court noted that a discharge can be regulated where "the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities were present so that the run-off could not be classified as 'stormwater.'" It further held, "discharges from land areas under control of a CAFO can and should generally be regulated, but where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of 'precipitation.'"

Further, the state's CAFO rule [R 323.2196(5)(d)] provides that stormwater discharges from land areas under the control of a CAFO where production area waste or CAFO process wastewater has been applied in accordance with the CNMP and where such discharges do not constitute a violation of the state's water quality standards are in compliance with the rule, provided that such discharges are authorized in an NPDES permit.

MAEAP Partnership Agreement

In December 2000, the Department of Agriculture, Department of Environmental Quality, Michigan State University, MSU Extension, Michigan Agricultural Experiment Station, and U.S. Department of Agriculture – Natural Resource Conservation Service jointly entered into a "partnership agreement" to formalize their roles and responsibilities under the MAEAP program. The agreement notes, among other provisions, (1) certification under the program "carries no regulatory significance other than to inform local, regional, state and federal agencies of the farmer's efforts in meeting program requirements;" (2) "nothing in this agreement shall be construed to release a livestock producer from complying with the applicable federal, state, regional, or local environmental statutes, regulations, or consent orders;" and (3) "nothing in this agreement shall be construed as surrendering existing statutory or regulatory authority of any party."

With respect to certification, the agreement states, "Participation in MAEAP by a livestock producer is strictly voluntary. These certification requirements are intended to assist the farmer in complying with laws and regulations set forth in state and federal law. In order for a producer to become certified in MAEAP Livestock Systems, each of the requirements listed below [education, development of the CNMP, and on-site assessment] must be completed. By participating in this partnership agreement, the signatories to this agreement are not making a determination that producers receiving third party certification are in compliance with applicable laws. However, third party certification as performed by MDA is one mechanism by which local, state, and federal regulatory agencies are informed of a producer’s 'good faith' efforts in achieving compliance with environmental laws."

Additionally, the agreement states that the "MDEQ will consider the 'good faith' efforts of farmers participating in the MAEAP Livestock Systems module when investigating environmental problems on farms [and] will factor the findings of the MAEAP assessment into enforcement considerations." Further, the agreement states that the DEQ will refer livestock operations found in violation of state and federal laws to participation in MAEAP.

FISCAL INFORMATION:

Michigan Department of Agriculture MAEAP activities are currently funded from appropriations in the annual state Agriculture budget. There is not a specific line item for the MAEAP program; program costs are authorized and included under the broader *Environmental Stewardship* line item.

The department indicates that its costs related to the current program are approximately $635,500 with funding provided from the state General Fund ($293,500), interdepartmental grants from the Department of Environmental Quality ($150,000), and federal Clean Water Act Section 319 grants ($192,000). The current funding supports the costs of one program manager, three field verifiers, and 3.5 planning positions in local conservation districts.

The department indicates that in order to implement the proposed MAEAP legislation, it would need additional funding to double its capacity to verify farms, add capacity for ongoing inspections, increase capacity to provide technical planning assistance, and provide for administration of grant and loan programs. The department indicates that it would need to add an additional three field verifiers, 3.5 planning positions in local conservation districts, 1.5 positions for administrative support, and one grant/loan fund administrator. The department estimates that it would cost an additional $720,000 to provide this increased level of program support.

ARGUMENTS:

For:

Generally speaking, the bills are intended to strengthen the Michigan Agricultural Environmental Assurance Program and encourage farmers to enroll in the program. The program encourages farmers to take a proactive approach to address environmental concerns and reduce pollution stemming from their operations. The program includes an educational component designed to increase a farmer's awareness of the environmental risks associated with his or her farming operation, and the development of a site specific management plan. Perhaps the most important component of the MAEAP program is the development of a site-specific Comprehensive Nutrient Management Plan to help the farmer comply with Generally Accepted Agricultural Management Practices, particularly those related to manure management.

The MAEAP has received recognition for its innovative approach to addressing environmental concerns of farming operations. In 2005, the program was a regional

finalist for the Innovations Awards program of the Council on State Governments. Also, the program was selected as one of the top 150 local conservation programs in the country through the White House Conference on Cooperative Conservation. Despite its apparent success, for the program to have a lasting impact on the environment, the program needs to be expanded to include more farms in the state. To date, more than 3,000 farmers have received technical assistance training under the MAEAP, and more than 200 farms are verified under one of the three systems. However, with roughly 50,000 family farms in Michigan, the program reaches only a small percentage of Michigan farms. Clearly, incentives are needed to encourage farmers to enroll in the program.

House Bill 5711 contains several provisions that are aimed at encouraging farmers to enroll in MAEAP and place the program on firmer statutory ground. First, the bill provides that MAEAP-verified farms shall not be considered to have caused impairment of the state's natural resources unless water quality tests conclusively show that the farm caused a body of water to violate state water quality standards. This provision requires *scientific certainty* when finding that a farming operation caused impairment of the state's natural resources and, thus, violated the act. A finding that a violation occurred should not be inferred based on assumptions about the data.

Additionally, the bill provides that if a MAEAP-verified farm conforms to the program's verification standards, any precipitation-related discharge from the farm shall be considered to be an "agricultural storm water discharge" for which the farmer would not be subject to civil or criminal penalties under Part 31. The bill is similar to a provision in federal regulations related to concentrated feeding operations, and recognizes that certain weather-related events are simply beyond the farmer's control. (See also, the preamble of the federal regulations concerning the agricultural stormwater discharge cited earlier.) The MAEAP requires the development of a site-specific comprehensive nutrient management plan that is intended to provide for the appropriate utilization of nutrients and the minimization of any potential discharge of pollutants. If the farmer is following the nutrient management plan, and otherwise conforms to the verification standards, any discharge could reasonably be considered an agricultural stormwater discharge that was beyond the farmer's control. If the nutrient management plan was followed, and a discharge causing a violation of state water quality standards occurred nonetheless, the violation is not solely attributable to the farmer's practices. Rather, it is because the management plan isn't sufficient. The bill, then, requires that changes be made to the nutrient management plan.

It should be noted that this provision does not exempt all MAEAP-verified farms from criminal or civil penalties for all agricultural storm water discharges. The farm must conform to the verification requirements. If a farm was not following the nutrient management plan when a discharge occurred, its verification would be revoked and it would not be afforded the protection of being exempt from the penalty provisions of Part 31. This ensures that violators will not go unpunished, and encourages farmers to become MAEAP-verified and remain in compliance with the program's requirements.

For:

The bill permits MAEAP-verified and compliant livestock facilities that have not had a discharge (other than an agricultural storm water discharge) within the past five years to register with the Department of Agriculture in lieu of obtaining a NPDES permit from the Department of Environmental Quality. If the farm has had a discharge (other than an agricultural storm water discharge) the registration would be revoked and a permit would be required.

This provision appears to be consistent with federal requirements. The 2003 federal CAFO regulations required CAFOs to obtain a CAFO permit, unless the farm had "no potential to discharge." The *Waterkeeper Alliance* decision invalidated this requirement, holding that the CWA regulated only *actual* discharges, not the *potential* discharge of pollutants. To this point, the decision stated, "in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, an no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." The proposed regulations, issued in response to the *Waterkeeper Alliance* decision, would require that all CAFOs that discharge or propose to discharge obtain an NPDES permit. This requirement would apply to all CAFO owners and operators irrespective of the volume or duration of the discharge, except for agricultural stormwater discharges. To the extent that the bill requires permits for CAFOs that have had an *actual* discharge, the bill follows federal requirements.

Against:

The bills are a marked departure from decades of state environmental regulation. The state has long required permits for firms that discharge or have the potential to discharge. If a firm has the potential to discharge, why should the state wait until that firm has a unpermitted discharge that impairs its natural resources before it requires the firm to obtain a permit? Moreover, the bills provide the agricultural sector with an exception to the permitting requirements that is not available to other sectors (industrial and manufacturing) that are subject to the permitting requirements.

Against:

As a general argument against the bills, there is concern among environmental groups and the Department of Environmental Quality that the bills would likely result in the federal Environmental Protection Agency revoking the state's authority to administer the National Pollution Discharge Elimination System (NPDES) program under the Clean Water Act. Reportedly, the 1999 petition to the EPA seeking revocation of the state's authority has not officially been closed. While the bills apply to farms of all sizes and types, they particularly have a great impact on the DEQ's NPDES permitting requirements for concentrated animal feeding operations. These bills represent a great opportunity for the petitioners (Sierra Club, Michigan Land Use Institute, and Michigan Environmental Council) and the EPA to revisit that petition and consider revoking the states delegated authority.

The petition was largely put on hold after the state agreed to issue a NPDES permit for CAFOs. If the state were go back on that permitting requirement, it more than likely that the petitioners would again seek the revocation of the state's delegated authority, particularly considering their stated opposition to the bills. The revocation of this authority would have far reaching consequences. The NPDES program primarily covers the industrial and manufacturing sectors. If the state's authority were revoked, the NPDES program would then be administered by EPA staff out of its regional office in Chicago. Given that nearly every other state is also authorized to administer the NPDES program, the EPA has neither the time nor resources to issue permits. Moreover, EPA control of the NPDES program would not eliminate the need for a state permit. A permit would just be issued under Michigan law, rather than the state's delegated authority under federal law. This, in essence, would require two permits for the same operation.

Against:

The DEQ and many environmental groups testified that while they are supportive of the MAEAP, they are nonetheless concerned that HB 5711 and HB 5712 seem to substitute MAEAP verification for state environmental laws and rules. In committee testimony, the DEQ director cited extensively the MAEAP partnership agreement, which states, among other things, (1) verification under the program "carries no regulatory significance other than to inform local, regional, state and federal agencies of the farmer's efforts in meeting program requirements;" (2) "nothing in this agreement shall be construed to release a livestock producer from complying with the applicable federal, state, regional, or local environmental statutes, regulations, or consent orders;" and (3) "nothing in this agreement shall be construed as surrendering existing statutory or regulatory authority of any party." The bills seem to go against all three of those provisions. The bills in this package do precisely the opposite. They turn the MAEAP program into a regulatory program though it wasn't created as one; they release verified farms from complying with environmental laws – e.g. under HB 5711 MAEAP-verified farms that violate state water quality standards are exempt from civil and criminal penalties under NREPA-Part 31; and they require the DEQ to surrender its authority under both Part 31of NREPA and the Clean Water Act with respect to agricultural operations.

Against:

Both the DEQ, in committee testimony, and the EPA, in its proposed revised CAFO regulations, have noted the importance of obtaining a NPDES permit. The EPA's proposed revised regulations state: "Because discharges are prohibited from unpermitted CAFOs, NPDES permit coverage reduces CAFO operator risk and provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act. Compliance with the permit is deemed compliance with the CWA and thus acts as a shield against EPA enforcement or citizen suits under CWA Section 402(k). Furthermore, under the 2003 rule, most CAFO NPDES permits will incorporate [effluent limitation guideline] provisions that allow for discharge when precipitation causes an overflow from a structure that is properly designed, constructed, operated, and maintained in accordance with applicable design standards. Finally, upset provisions can protect permittees from liability when emergencies or natural disasters cause discharges

beyond the permittee's reasonable control…This protection is not available to unpermitted CAFOs.

POSITIONS:

The Michigan Farm Bureau supports the bills. (6-20-06)

The Dairy Farmers of America support the bills. (6-20-06)

The Michigan Milk Producers Association support the bills. (6-20-06)

The Department of Environmental Quality opposes the bills. (6-20-06)

The Michigan Environmental Council opposes the bills. (6-20-06)

The Sierra Club opposes the bills. (6-20-06)

The Michigan Townships Association opposes the bills. (6-20-06)

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