

AQUATIC NUISANCE CONTROL

House Bill 4729

Sponsor: Rep. John Gleason

House Bill 4730

Sponsor: Rep. John Stakoe

Committee: Great Lakes and Tourism

Complete to 7-29-03

A SUMMARY OF HOUSE BILLS 4729 AND 4730 AS INTRODUCED 5-22-03

House Bill 4730 would add a new Part 33 to the Natural Resources and Environmental Protection Act (MCL 324.3301), also known as NREPA, to regulate the control of aquatic nuisance species. The new Part 33 would be entitled "Aquatic Nuisance Control."

Generally speaking, the bill would require a person who wanted to engage in "control work" (controlling aquatic nuisance and invasive species) to submit a Declaration of Intent to the Department of Agriculture, along with payment of a fee. The department could prevent such work in specified circumstances. The bill also would allow governmental units and lake riparian owners to submit vegetation management plans or lake management plans, also with a fee, to the Department of Agriculture. The new Part 33 would be enforced under a memorandum of understanding between the Commission and Department of Agriculture and the Department of Environmental Quality. These provisions are explained in more detail later in the summary.

House Bill 4730 would also repeal sections of the Public Health Code that currently address the application of chemicals to control aquatic nuisances. Those provisions (MCL 333.12561-12563) require those engaging in control work to first obtain a permit from the Department of Environmental Quality.

House Bill 4729 would make complementary amendments to Part 83 of the act, which deals with pesticide control, to specify that persons regulated under that part who violated the provisions of the new Part 33 would be subject to fines, warnings, and orders to stop prohibited conduct issued by the director of the Department of Agriculture, as well as civil actions.

House Bills 4729 and 4730 are tie-barred to each other, which means neither could take effect unless both did.

House Bill 4730 would specify that the application of pesticides to state waters to control "aquatic nuisances" would be lawful and not in contravention of the private or public rights to the use and enjoyment of abutting property by the property owners or occupants if the application was made in compliance with the requirements of Part 33, and of the provisions and rules promulgated under Part 83 of the act (pesticide control). Further, the bill would specify that control work could be undertaken on behalf of the state, a political subdivision of the state

(including, but not limited to, a drainage board), by a lake board or lake association, or by a person with riparian rights to the affected water body.

The term “aquatic nuisance” would be defined as any organism, including aquatic vegetation, that lives or propagates, or both, within the aquatic environment, and that impairs the use or enjoyment of the waters of the state, including the intermediate aquatic hosts for schistosomes that cause swimmer’s itch. The term “control work” would be defined to mean eradicating, suppressing, reducing, or managing nuisance or invasive species populations, preventing the spread of nuisance or invasive species from areas where they are present, or reducing the effects of nuisance or invasive species.

Memorandum of Understanding. The Commission of Agriculture and the director of the Department of Agriculture would be required to enter into a Memorandum of Understanding with the director of the DEQ. The investigation and resolution of violations of the provisions of the bill would have to be conducted in accordance with the memorandum. The Memorandum of Understanding would have to provide for both of the following:

- That the DEQ and the Department of Agriculture would provide notice to each other of suspected violations of the provisions of the bill.
- Any other matters relevant to the investigation and resolution of violations of the bill’s provisions that the parties to the memorandum considered advisable.

Further, the bill would specify that a person could not knowingly give false information to the DEQ or the Department of Agriculture in a matter pertaining to the provisions of the bill, or knowingly resist, impede, or hinder the department’s representative in the discharge of his or her duties under these provisions. A violation of the bill’s provisions would be subject to the applicable sanctions imposed under Part 83 of the act (pesticide control), as provided under House Bill 4729.

Definitions. The following are some of the key definitions found in the bill, listed in alphabetical order:

- “Class A control work” would mean control work that met both of the following requirements: a) the treatment area had a surface of more than two acres but less than ten acres and b) the treatment area had associated bottomlands under private ownership.
- “Class B control work” would be defined under the bill to mean control work that was not class A control work, and that met one or more of the following criteria: a) it took place on a water body with a surface area of less than 20 acres, and had no outlet; b) the treatment area was in the littoral zone and represented less than 50 percent of the total shoreline length; c) the treatment area was a marina constructed in an area above the ordinary high water mark of, and directly connected to, an inland lake, a Great Lake, Lake St. Clair, or the St. Marys, St. Clair, or Detroit rivers; or d) the treatment area was a canal, directly connected to an inland lake, constructed in an area above the ordinary high water mark of that lake, and did not connect two or more water bodies.

- “Class C control work” would be defined under the bill as control work that was not class A or class B control work and for which the treatment area had a surface area of more than two acres.

- “Lake management plan” would mean a plan for the management of an inland lake that included goals for preparing all of the following plans or gathering all of the following information, as applicable: all the information required for a Declaration of Intent for class C control work; a map showing all known wetlands, public land, access sites, and water control structures in or bordering the water body; a description of the aquatic vegetation communities; the size of the littoral zone (defined as the portion of a water body from the water’s edge to the limit of the depth of light penetration where rooted aquatic vegetation typically grows); shoreline length; existing information on, and a plan to develop and maintain, fish communities and wildlife communities; a proposed action plan and timeline, including vegetation goals and goal maps and vegetation management activities; a basic description of water quality; available information on water quality problems and causes; a brief description of water quality goals and options to achieve those goals; land uses surrounding the water body; monitoring and evaluation; and a brief description of the fish community in the water body.

- “Pesticide” would mean a substance or mixture of substances intended to prevent, destroy, repel, or mitigate aquatic nuisances.

- “Standard information” would be defined under the bill to include the applicator’s name, address, and telephone number; his or her license and certification number; the name and size of the water body; the location of the water body, including a map that clearly delineated the location and the treatment area for each pesticide; the active ingredient, trade name and application rate for each pesticide to be used. “Standard information” would also include, subject to the bill’s provisions, the approximate dates of the control work, if known, except for algaecide application; information as to whether drinking water for adjacent riparian property to the treatment area was from a municipal system or private wells; and the name and daytime and evening telephone numbers of the applicator, and, if different, the person on whose behalf the control work was to be performed.

- “Treatment area” would be defined to mean the area of pesticide application and any buffer zone or other area specified on the pesticide label.

- “Vegetation management plan” would mean a plan to manage vegetation in a water body that included all of the following: all of the information required for a Declaration of Intent for class C control work, as described under the bill; a map showing all wetlands, public land, access sites, and water control structures in or bordering the water body; a description of the aquatic vegetation communities; and proposed vegetation goals and goal maps and vegetation management activities for the vegetation plan as submitted.

Vegetation/Lake Management Plan. A vegetation management plan or lake management plan could be submitted to the Department of Agriculture by a political subdivision of the state, or a lake board or lake association or other group having demonstrated support from lake riparian owners. Either plan would have to be signed and accompanied by the fee specified under the bill. The plan would take effect beginning 42 days after it was submitted, unless, before that time, the department by certified mail notified the person who submitted the plan that it was

lacking required information and identified the specific reasons for the department's determination. The person could submit a revised plan, which would be subject to the same requirements as an original plan, within 42 days after the Department of Agriculture mailed the notification. No fee would be required for the revised plan. In addition, if the department notified a person that a revised plan lacked the required information, the fee that accompanied the original plan would be returned, and the plan could not receive further consideration from the department. However, a new plan could be submitted, accompanied by the required fee.

A signed plan update would have to be submitted to the department before March 1 of each year in which a Vegetation Management Plan or Lake Management Plan was in effect, except for the first year. The update for a Lake Management Plan would also have to specify progress made in achieving goals for preparing plans or gathering information, as set forth in the plan. In addition, an update for either type of plan could not propose major modifications.

Declarations of Intent. Under the bill, Class A control work on a treatment area could be performed by a licensed pesticide applicator or by the owner of the bottomlands associated with the treatment area. A signed Declaration of Intent (on a form provided by the Department of Agriculture) would have to be submitted to the department at least 5 days before the work was performed. The Declaration of Intent would have to include all of the following information: "standard information," as defined under the bill; the target species, if known; and a brief explanation of the need for the control work.

Class B control work would have to be performed by a licensed applicator, unless it was performed on a water body described in the bill as having a surface area of less than 20 acres, and did not have an outlet, in which case it could be performed by the owner or owners of the bottomlands associated with the treatment area. A signed Declaration of Intent would have to be submitted to the Department of Agriculture not less than ten days before the work was performed. In addition, unless the Class B control work was to be performed according to a vegetation management or lake management plan, it would have to be accompanied by a fee, as provided under the bill, and would have to include the following: standard information; the target species; a brief explanation of the need for the control work; a map of the treatment area, size of the treatment area, and, for control work in the littoral zone or on a water body with a surface area of less than 20 acres and no outlet, the total shoreline length.

If the class B control work was to be performed according to a vegetation management or lake management plan, the Declaration of Intent would have to include the applicator's name, address, and telephone number; his or her certification and, if applicable, license number; the name and location of the water body; the active ingredient, trade name and intended application rate for each pesticide to be used; subject to the bill's provisions, the date of control work, except for algaecide application; and the applicator's name and daytime and evening telephone numbers, and the person on whose behalf the control work would be performed if that person was not the applicator.

Class C control work would also have to be performed by a licensed or certified applicator. The requirements for class C control work would generally be the same as those specified for class B control work, except that the Declaration of Intent would have to be submitted at least 14

days before the work was performed, and the map of the treatment area would have to show the littoral zone, and known inlets, outlets, and wetlands within or adjacent to the treatment area. If the class C control work was being performed under a vegetation management or lake management plan, the information required would be the same as for a Declaration of Intent for class B control work under such plans.

Amendments to Declarations of Intent. If, after a person submitted a declaration of intent, the application rate or class of the pesticide to be used for control work changed, or if the date on which the control work was to be performed changed or was not known when the application was submitted, the person would have to amend the declaration to update that information and submit the amendment in writing or by electronic mail. If other information changed after a declaration's submission, a new Declaration of Intent would have to be submitted.

Order by Department of Agriculture Prohibiting Control Work. Beginning 5, 10, or 15 days, respectively, after a Declaration of Intent for class A, class B, or class C control work had been submitted, or 48 hours after the department received an amendment, whichever period expired later, a person could proceed with the control work as described unless the director of the Department of Agriculture issued an order prohibiting the work. The director could issue such an order for either of the following causes:

- The use of a pesticide, although otherwise in accordance with the labeling would result in either or both 1) a public health hazard or 2) substantial and identifiable negative impacts to the natural resources or the public trust therein of a type or magnitude not considered by the U.S. Environmental Protection Agency (EPA), or the Department of Agriculture in the decision to register the pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or the provisions of Part 83 of the NREPA (pesticide control), respectively.
- The Declaration of Intent lacked the required information or contained false information.
- The Declaration of Intent was not accompanied by the required fee.

Under the bill, an order prohibiting the control work would have to include findings of fact, and those findings would have to be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

Fees. A Declaration of Intent would have to be accompanied by the following non-refundable fees: for treatment areas less than one-half an acre, a fee of \$25; for a treatment area equal to or greater than one-half acre but less than two acres, \$75; for a treatment area equal to or greater than two acres but less than ten acres, \$175; and for treatment areas of ten acres or more, \$300. A Declaration of Intent for control work performed under a vegetation management plan or lake management plan would have to be accompanied by a fee during the first year the plan was submitted and every fifth year thereafter. That fee would be four times the fee due for the size of the treatment area. Fees would be forwarded by the Department of Agriculture to the Department of Treasury for deposit in the Land and Water Management Permit Fee Fund.

[Sections of the Public Health Code that would be repealed by House Bill 4730 require fees to accompany an application for a permit from the DEQ to engage in control work. Those fees

are \$50 for treatment of areas one-half acre or more and less than two acres and \$150 for treatment of areas of two acres or more. No fee is currently required for owners of a single property treating waters abutting their property where the treatment is less than one-half acre or for water bodies in single ownership. Those fees currently are forwarded for deposit in the Land and Water Management Permit Fee Fund.]

No Declaration of Intent Needed. No declaration of intent would be required for control work in any of the following water bodies: a water body wholly owned by one person, other than the state, and not connected to waters of the state; a water body used exclusively for agricultural purposes not connected to waters of the state; electrical power cooling ponds, reservoirs, or canals not connected to waters of the state; a water body of ten surface acres or less without an outlet; the specific area of a water body where a dredge-and- fill activity is permitted by the DEQ and aquatic plants are removed as part of the permitted activity; and a drain under the Drain Code.

Control Work Requirements. Whether or not a Declaration of Intent was required, all control work would have to be conducted in a manner so as to protect human health, safety, and recreational use and to prevent injury to nontarget plant and animal life, and property, to the greatest degree practicable. A person performing control work with a herbicide would have to comply with label rates, instructions, cautions, and directions, and would have to follow public notice requirements. Also under the bill, control work would have to comply with the following requirements:

- Control work could not result in less than 25 percent cover with native submergent aquatic vegetation in the littoral zone of the lake, except for any of the following: ponds included on the department's reduced review list, if control work was conducted when there is no continuous outflow; marinas constructed in an area above the ordinary high water mark of an inland lake, Great Lake, Lake St. Clair, or a connecting channel; or an eradication program.

- Floating leaf and emergent vegetation could not be damaged, except under one or more of the following conditions:

- An area of not more than 20,000 square feet could be cleared by control work along each developed riparian property, regardless of the shoreline length of the riparian property.

- A 25-foot wide channel could be cleared by control work to allow access to open water. However, if an area was cleared in accordance with the above requirements for clearing a 20,000 square-foot area, the channel would have to be added to the lakeward side of the 200 by 200-foot area so that the total width of plant removal did not exceed 200 feet.

- The target area was in a pond included on the department's reduced review list and control work was conducted when there was no outflow.

- The target area was in a marina constructed in an area above the ordinary high water mark of an inland lake, Great Lake, Lake St. Clair, or a connecting channel.

- Control work would be authorized only in areas where the riparian property was developed, except that selective control of invasive aquatic vegetation and control of nuisance

vegetation in an area not to exceed 200 feet by 200 feet adjacent to privately owned undeveloped riparian property would be authorized.

- Control work could not result in substantial and identifiable damage to aquatic vegetation or in water use restrictions in areas not described as a target area in the declaration of intent.

Public Notice. Not less than three days before performing control work, an applicator would have to provide notice of the pesticide to be used, the treatment area, and restrictions on the use of treated water by one of the following methods:

- Publication of a notice in a newspaper of general circulation in the area where the water body was located.

- Broadcasting an announcement on a radio station that served the area where the water body was located.

- First-class mail, addressed to residents with riparian rights to the water body.

Posting of Signs in Treatment Area. The bill would require that, before performing control work, an applicator would have to post the treatment area with signs, as follows:

- For a treatment area of less than two acres in size, signs would have to be posted along the shoreline of the area of impact not more than 100 feet apart. To allow for drift of chemical from the treatment area, riparian lands adjacent to the treatment area would also have to be posted, if permitted by the riparian owners.

- For a treatment area of two or more acres in size, signs would have to be posted in the same manner as above. In addition, all known public access sites, boat launching areas, and private and public parks located on the water body would have to be posted conspicuously, such as at the entrances, boat ramps, and bulletin boards, if permitted by their managers or owners. If these sites, launching areas, or parks were not to be treated, or were not adjacent to the treatment area, the signs would have to clearly indicate the location of the treatment area and outline the restrictions or the use of the water in the treatment area.

The bill would also specify that a printed sign would have to be approved by the department, and include the name, address, and telephone number of the applicator; and the name of the pesticides and the restrictions on the use of treated water, according to the labeling. In addition, the bill would specify that an applicator would not be liable if posted signs were removed without that person's consent; that the applicator would have to allow department representatives to collect a sample of the pesticide used, before or during the control work, as determined by the department; that the sample could not be a larger quantity than was required for analysis; and that the department could conduct spot checks to monitor compliance with these provisions.

Land and Water Management Permit Fee Fund. Currently, the act specifies that the DEQ must expend money from the Land and Water Management Permit Fee Fund to implement certain parts of the NREPA. House Bill 4730 would extend the list to include the new Part 33.

Analyst: C. Couch

■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.