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 BILL ANALYSIS

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House Bill 4729 (as passed by the House)
House Bill 4730 (Substitute S-2)
Sponsor: Representative John J. Gleason (H.B. 4729)
Representative John P. Stakoe (H.B. 4730)
House Committee: Great Lakes and Tourism
Senate Committee: Natural Resources and Environmental Affairs

Date Completed: 5-25-04

CONTENT

House Bill 4729 would amend Part 83 (Pesticide Control) of the Natural Resources and Environmental Protection Act to include references to Part 33 (proposed by House Bill 4730) in provisions for the licensure of pesticide applicators, and to include violations of Part 33 among grounds for administrative sanctions and criminal penalties.

House Bill 4730 (S-2) would add Part 33 (Aquatic Nuisance Control) to the Natural Resources and Environmental Protection Act to do the following:

- Require that a person obtain a permit from the Department of Environmental Quality (DEQ) for the chemical treatment of some State waters and bottomlands of the Great Lakes and Lake St. Clair for the purposes of controlling aquatic nuisance species.
- Allow the chemical treatment of other State waters without a permit, for the purposes of aquatic nuisance control, if the body of water met certain conditions.
- Prescribe annual permit application fees.
- Authorize the DEQ to impose various permit conditions.
- Provide that a person who violated Part 33 or a condition of a permit issued under Part 33 would be guilty of a misdemeanor, punishable by up

to 90 days' imprisonment and a \$500 fine.

The bill also would repeal sections of the Public Health Code that presently require a permit from the DEQ for the application of chemicals to water for the control of aquatic nuisances.

House Bill 4729 is tie-barred to House Bill 4730.

House Bill 4730 (S-2)

Current Provisions

Section 12561 of the Public Health Code requires the Department of Natural Resources (DNR) to supervise the chemical treatment of the waters of the State for the suppression of swimmer's itch and other nuisance-producing organisms, including aquatic plants; and authorizes the Department to promulgate rules describing the type of chemicals and solutions to be used, the manner and time of application, and public notice and permit-granting procedures.

Section 12562 states that the application of chemicals to water for the control of aquatic nuisances is lawful if the application complies with these sections and promulgated rules. After obtaining a permit from the DEQ, the following may conduct necessary control work: the State or a political subdivision; an organized lake or

improvement association on behalf of its members; the owner of property abutting the water; and an aquatic pest control applicator licensed under Part 83. This section also sets permit application fees that apply until October 1, 2008.

Under Section 12563 of the Code, it is a misdemeanor to undertake control work without the necessary permit, or to violate a DNR rule or a permit condition. A permit issued under Section 12562 must be automatically revoked for a violation.

The bill would repeal these sections of the Public Health Code.

Permit Requirements

The bill would prohibit a person from chemically treating either of the following for the purposes of aquatic nuisance control unless the person had obtained from the DEQ an individual permit or a certificate of coverage under a general permit: 1) Any waters of the State, if water were visibly present or contained in the area of impact at the time of chemical treatment; and 2) the Great Lakes and Lake St. Clair, if the area of impact were exposed bottomland located below the ordinary high-water mark.

A person, without a permit, could chemically treat waters of the State for purposes of aquatic nuisance control if all of the following criteria were met:

- The waterbody did not have an outlet.
- The DNR did not have information on record that the area of impact was used by a species listed as endangered or threatened under the Act.
- The waterbody had a surface area under 10 acres.
- If more than one person owned the bottomlands of the waterbody, each owner gave written permission for the proposed chemical treatment.

A person conducting a chemical treatment without a permit would have to maintain any written permissions and records of treatment, including treatment date, chemicals applied, amounts applied, and a map indicating the area of impact, for one year from the date of each chemical treatment. The records would have to be made available to the DEQ upon request.

A permit would have to include all of the following information, at a minimum:

- The active ingredient or the trade name of each chemical to be applied.
- The application rate of each chemical.
- The maximum amount of each chemical to be applied per treatment.
- The minimum length of time between treatments for each chemical.
- A map or maps clearly delineating the approved area of impact.

The bill would define "aquatic nuisance" as an organism that lives and/or propagates 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.

"Waters of the state" or "waterbody" would mean groundwaters, lakes, ponds, rivers, streams, and wetlands and all other watercourse and waters within the jurisdiction of the State, including the Great Lakes bordering the State.

"Certificate of coverage" would mean written authorization from the DEQ to implement a project under a general permit. "General permit" would mean a permit for a category of activities that the DEQ had determined would not negatively affect human health, and would have no more than minimal short-term adverse impacts on the natural resources and environment.

Lake Management Plan

If a whole-lake treatment were proposed, a permit applicant would have to provide a lake management plan as part of an application. "Lake management plan" would mean a document required by the Department to provide information necessary to evaluate matters related to the issuance of a whole lake treatment permit. The study elements required by the DEQ for a lake management plan would have to be relevant for the control of the specified target organisms and likely associated impacts.

Supporting Evidence

An applicant for a permit could provide evidence or arguments that would support the use of a specific pesticide application

rate or means of application for proposed whole lake treatments for consideration by the Department on a lake-by-lake basis, including those where fluridone was proposed for use at rates in excess of 6 ppb. If the DEQ did not concur with the applicant's evidence, arguments, or conclusions, the Department would have to provide scientific justification for the dose rate and application method specified on the permit.

Application Fee

The bill would establish permit application fees that would apply until October 1, 2008. The fee for a certificate of coverage under a general permit would be \$75. The fee for an individual permit would be based in the size of the area of impact, as follows:

- \$75 for less than one-half acre.
- \$200 for one-half acre or more but less than five acres.
- \$400 for five acres or more but under 20 acres.
- \$800 for 20 acres or more but less than 100.
- \$1,500 for 100 acres or more.

(These fees are identical to the fees set under Section 12562, which also apply until October 1, 2008.)

As currently required, the DEQ would have to forward fees to the State Treasurer for deposit in the Land and Water Management Permit Fee Fund.

Application Approval or Denial

The DEQ would have to approve or deny an application for a certificate of coverage within 15 days after receiving the application. If the DEQ denied an application, it would have to notify the applicant of the reasons for the denial.

The DEQ would have to approve a permit application in whole or in part and issue the permit, or deny the application, by April 15 or within 30 working days after it received a complete application, whichever was later. If the DEQ approved an application in part or if it denied an application, it would have to notify the applicant in writing of the reasons for the partial approval or denial, by the same deadline.

If the Department did not grant an application for a permit and issue it by April 15 or with 30 working days after receiving a complete application, the application would be considered approved if the following three conditions were met: 1) The proposed chemical treatment was consistent with the product labeling; 2) a whole lake treatment was not proposed; and 3) all of the following applied to a permit issued in the preceding year for chemical treatment of the same waterbody: the proposed chemical had the same active ingredient or trade name as the chemical approved the preceding year; the proposed chemical application rate and the scope of the treatment were not greater than that approved in the preceding year; and conditions in the waterbody were substantially the same as in the preceding year.

Permit Conditions

As a condition of a permit, the DEQ could require the permittee to do any of the following:

- Notify the DEQ at least two working days before chemical treatment.
- Proceed with chemical treatment only if a DEQ representative were present.
- Allow the DEQ or its representative to collect a sample of the chemical or chemicals used before or during any treatment.
- Apply chemicals so that swimming restrictions and fish consumption restrictions were not imposed on any Saturday, Sunday, or State-declared holiday.
- Take special precautions to avoid or minimize potential impacts on human health, the environment, and nontarget organisms.
- Complete and return the treatment report form provided by the DEQ for each treatment season.
- Perform lake water residue analysis to verify the chemical concentrations in the waterbody according to a frequency, timing, and methodology approved by the DEQ.
- Perform pretreatment monitoring of the target plant population according to a frequency, timing, and methodology that the DEQ had approved before submittal of a permit application.

The DEQ could require a permittee to post signs at the area of impact before treatment, as described in the bill. The DEQ also could require the permittee to publish a notice in a local newspaper or make an announcement on a local radio station regarding the treatment. A sign, notice, or announcement would have to contain information specified in the bill, including the permit number, the name of the waterbody, the chemicals to be used, water use restrictions, and the dates of treatment.

Further, the DEQ could require a permittee to give written notice to an owner of any waterfront property within 100 feet of the area of impact, between seven and 45 days before the initial treatment. If the owner were not the occupant of the waterfront property or the dwelling located on it, the owner would be responsible for notifying the occupant.

In addition, the DEQ could require a permittee to use chemical control methods for nuisance aquatic vegetation that were consistent with the approved vegetation management plan submitted separately or as part of a lake management plan. Upon receiving a written request, including supporting documentation, from the permittee, the DEQ could approve modifications to the vegetation management plan.

The DEQ could make minor revisions to a permit, based on minimizing the impacts on natural resources, public health, and safety, or to improve aquatic nuisance control, if the proposed revisions did not involve a change in the scope of the project, and the permittee requested the revisions in writing. The request would have to include the proposed changes to the permit; an explanation of the necessity for the changes; maps clearly delineating any proposed changes to the area of impact; and any additional information that would help the DEQ reach a decision on a permit amendment.

Permission from Bottomlands Owner

An applicant would have to obtain written permission for chemical treatment from each person who owned bottomland in the proposed area of impact. The applicant would have to retain the written permission for one year from the permit's expiration

date, and make the records available to the DEQ upon request. Written permission from each bottomland owner would not be required if the applicant were providing, or had contracted to provide, chemical treatment either for the State or a local unit of government acting under authority of State law to conduct lake improvement projects or to control aquatic vegetation, or for a lake board.

Penalties; Hearing

A person who violated Part 33 or a condition of a permit issued under Part 33 would be guilty of a misdemeanor punishable by a maximum of 90 days' imprisonment and/or a maximum fine of \$500. Upon a person's conviction, any permit or certificate of coverage issued to the person under Part 33 would be automatically revoked.

Subject to provisions for a contested case hearing, the DEQ could revoke a person's permit or certificate of coverage if the person violated a permit or Part 33.

A person aggrieved by an order issued under Part 33 or an order to stop prohibited conduct under Section 8329 as it related to Part 33, an applicant for or holder of a permit or certificate of coverage aggrieved by the denial or revocation of a permit or certificate, or a permittee aggrieved by a condition in a permit, would be entitled to a contested case hearing under the Administrative Procedures Act.

Other Provisions

A pesticide could not be used in waters of the State for aquatic nuisance control unless it was registered with the Environmental Protection Agency and the Michigan Department of Agriculture (MDA) for the aquatic nuisance control activity for which it was used.

The DEQ could conduct evaluations of the impacts and effectiveness of any chemicals proposed for use for aquatic nuisance control in waters of the State. This could include the issuance of permits for field assessments of the chemicals.

In consultation with the MDA Director, the DEQ Director could issue an order to prohibit or suspend the use of a chemical for aquatic nuisance control if, based on substantial

scientific evidence, use of the chemical caused unacceptable negative impacts on human health or the environment. The DEQ could not issue permits authorizing the use of such chemicals. Upon notification by the DEQ, a person would have to stop using the chemicals.

The DEQ could promulgate rules to implement Part 33.

House Bill 4729

Currently, the DEQ Director may refuse to issue or renew a commercial pesticide applicator license if the applicant has unsatisfied judgments against him or her under Part 83 or a rule promulgated under it. The Director also may deny, revoke, or suspend a license or a certification or registration for a violation of Part 83 or an order issued under it, or upon conviction under Part 83, the Federal Insecticide, Fungicide, and Rodenticide Act, or a pesticide law of a reciprocating state. Under the bill, a violation of Part 33 or an order issued under it, or a conviction under Part 33, also would be grounds for denial, revocation, or suspension, and unsatisfied judgments under Part 33 would be grounds for refusal to issue or renew a license.

If the Director has probable cause to believe that an applicator is using or intending to use a pesticide in an unsafe or inadequate manner or in a manner inconsistent with its labeling, the Director must order the applicator to cease the use of or refrain from the intended use of the pesticide. The bill also would refer to use of a pesticide in violation of Part 33 or rules promulgated under it.

When the Director has reasonable suspicion that a pesticide or device is distributed, stored, transported, offered for sale, or used in violation of Part 83, he or she may issue an order to stop the prohibited conduct. Under the bill, this also would apply to distribution, storage, etc. in violation of Part 33.

Upon finding after notice and an opportunity for a hearing that a person has violated or attempted to violate Part 83, the Director may impose an administrative fine of up to \$1,000 for each violation, and may file a civil action for an injunction. A person who violates or attempts to violate Part 83 is

guilty of a misdemeanor punishable by imprisonment for up to 90 days and/or a maximum fine of \$5,000. The Attorney General may file a civil action in which the court may impose a civil fine of up to \$5,000 for each violation or attempted violation. The Attorney General also may bring a civil action to recover the reasonable costs of the investigation. The bill would extend these penalties to violations or attempted violations of Part 33.

Currently, as an affirmative defense, a person may present evidence that, at the time of the alleged violation, he or she was in compliance with label directions and with Part 83 and rules promulgated under it. Under the bill, this also would apply to an alleged violation of, and compliance with, Part 33.

Under Part 83, a civil cause of action does not arise for injuries to any person or property if a private agricultural applicator, or a registered applicator who stores, handles, or applies pesticides only for a private agricultural purpose, was not grossly negligent and stored, handled, or applied pesticides in compliance with Part 83 and rules promulgated under it. The bill also would refer to compliance with Part 33.

MCL 324.8313 et al. (H.B. 4729)
324.30113 et al. (H.B. 4730)

Legislative Analyst: Claire Layman

FISCAL IMPACT

Fees; Administration. The fees that would be established in House Bill 4730 (S-2) are already set in statute at the same rates with the same sunset date. The bill would require the Department of Environmental Quality to grant or deny an application for a certificate of coverage within 15 days and an application for a permit before April 15 or within 30 working days of receipt of a completed application. Since the chemicals are applied primarily during the summer months, almost all of the permit applications are submitted in the spring. The decision-making deadline of April 15 is slightly earlier than the date the Department currently targets. If all permits were not granted or denied by the Department by this date, then permits could be approved without review.

Corrections. The bills would have an indeterminate fiscal impact on State and local government.

There are no data to indicate how many offenders are currently convicted of a violation of the related sections of the Public Health Code, which would be repealed by House Bill 4730 (S-2). Nor are there data to indicate how many more offenders would be convicted of violating the expanded circumstances in proposed Part 33. A violation would be a misdemeanor punishable by up to 90 days' imprisonment and/or a fine of up to \$500. Local governments incur the cost of misdemeanor probation and incarceration, the costs of which vary by county.

Administrative Fine; Cost Recovery. House Bill 4729 could result in additional administrative fine revenue associated with violations of Part 33. Further, the Attorney General could bring action in circuit court to recover investigative costs associated with violations and attempted violations of Part 33. This revenue would be deposited in the Pesticide Control Fund. The amounts of administrative fine revenue and investigation cost revenue are unknown and would be contingent on the number of violations and attempted violations of Part 33.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.