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DAM SAFETY AND REPAIR

House Bill 4211 as enrolled
Public Act 100 of 1995
Second Analysis (6-28-95)

Sponsor: Rep. John Llewellyn
House Committee: Conservation,
Environment, and Great Lakes
Senate Committee: Natural Resources
and Environmental Affairs

THE APPARENT PROBLEM:

A dam that stood for more than 100 years in the Village of Luther in Lake County was destroyed in 1986 during the heavy rains and flooding that inundated most of Michigan in the fall of that year. The dam had become an integral part of the community, and residents applied, and received, funds from the Federal Emergency Management Agency (FEMA) to return it to pre-1986 conditions. Although the Department of Natural Resources (DNR) denied the village's application for a permit to rebuild the dam, legislation was enacted in 1988 to exempt it from the reconstruction permit requirements of Public Act 184 of 1963, which was the statute governing the construction of dams at that time. (Public Act 184 was subsequently repealed and replaced by the Dam Safety Act of 1989.) Once rebuilt, however, the Luther dam again collapsed (in 1993). The village sued the contractor and engineer involved in the project, recovered sufficient funds to repair the dam, and passed a resolution on April 12, 1995, to have this done. Since the DNR has again denied the village's application for the required permit, the village has requested that its waiver from reconstruction permit requirements, which expired in 1991, be extended.

THE CONTENT OF THE BILL:

Certain dams that were damaged or destroyed by floods in 1986 were exempt, from 1988 to 1991, from the reconstruction permit requirements of the former Dam Safety Act. (The Dam Safety Act was repealed and reenacted into the new Natural Resources and Environmental Protection Act [NREPA] by Public Act 59 of 1995, enrolled House Bill 4350.) House Bill 4211 would amend the NREPA to reenact this exemption until January 1, 1998 for any dam that is destroyed by an act of God, provided that a portion of the dam is at least

75 years old and is located in a county with a per capita income of less than \$8,500.

The former provision also required that reconstruction plans and specifications for dams that were exempt from permit requirements be prepared by licensed professional engineers and approved by the legislature's Joint Capital Outlay Committee (JCOC). Under House Bill 4211, these plans would still have to be submitted to the JCOC, but its approval would not be required. In addition, under the bill, the JCOC would be allowed to recommend, but could not require, that certain environmental considerations be included in the plans and specifications for a project.

MCL 324.31506

BACKGROUND INFORMATION:

The dozens of dam failures that occurred during the 1980s were attributed by many to the fact that there wasn't enough oversight over dam operations and maintenance, and that there was confusion over which public entity had authority to permit or prohibit dam construction. Consequently, the legislature enacted the Dam Safety Act in 1989 to ensure that dams were built, repaired, and operated under sufficient oversight to safeguard public health and safety, to protect private and public property from damage that could be caused by dam failures, and to preserve the public's natural resources. Among other provisions, the new act provided for comprehensive regulation by the Department of Natural Resources (DNR) of all activities related to dams, and granted the DNR jurisdiction over all dams and impoundments (the water held back by dams) in the state. The new act also expanded permit and fee requirements; specified the

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violations, penalties, and financial remedies for damages due to violations; and made provisions regarding notice of potential hazards, grievance hearings, liability and legal remedies, and compliance with other acts.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no impact on state funds. (5-4-95)

ARGUMENTS:

For:

The bill would circumvent the lengthy DNR permit process and -- since the Village of Luther's reconstruction plans and their environmental impact were approved by the House Joint Capital Outlay Committee (JCOC) the first time the dam was rebuilt -- also eliminate the requirement that the JCOC approve the plans this time. According to testimony presented before the committee by the village legal counsel, the waterway impeded by the dam in the village of Luther has provided, in addition to valuable lakefront property, fishing and swimming opportunities for many residents. The area would like to return to the type of lifestyle afforded them by the dam for over 100 years. Also, since tourism is important to the economy of sparsely populated areas such as Lake County, the community values the economic benefits of the recreational opportunities provided by its landmark dam.

In addition, the village's legal counsel pointed out that the dam failure in 1993 involved only the reconstructed part of the dam, and not the original structure. Engineering and construction experts consulted by the village maintain that this occurred because the pilings only extended 12 feet into the river bedrock, which allowed pressure to build and forced water under and around the pilings. These experts estimate that the problem can be relieved by installing sheet metal pilings 20 to 30 feet down into the river bedrock in place of the 12-foot pilings that were initially installed. Since the court has decided that those responsible for the dam's failure should pay for its reconstruction, it would seem fair that the village could at least have its dam returned to its pre-1993 condition.

Response:

The provisions of the bill would serve to establish the precedent of bypassing the environmental

considerations now required before dams may be rebuilt or repaired. While it is true that the village submitted its reconstruction plans and specifications to the JCOC the first time it was granted a waiver from the act's permit requirements, the site has undoubtedly undergone changes since that time. For example, due to the dam's second failure, there are concerns regarding erosion of the dam's foundations, and further problems of silt and sand washing downstream from the dam. Since these new environmental conditions would have to be taken into consideration, the JCOC's authority to require that certain environmental consideration be included in the plans and specifications for the project should be retained.

For:

As pointed out by the Luther village legal counsel in testimony before the committee, the Luther village dam was one of only two dams that were denied repair or reconstruction permits by the Department of Natural Resources (DNR) after the 1986 floods. This, the village counsel maintains, is due to the current DNR policy that prohibits the damming of free-flowing rivers and streams. However, some may argue that it is the legislature, and not the DNR, that controls public policy.

Response:

According to the Department of Natural Resources (DNR), it has no policy prohibiting the damming of certain rivers or streams. However, as pointed out in its June 6, 1987, "MDNR Determination" on the village's reconstruction proposal, signed by the department director, a project must meet certain requirements to obtain approval: the DNR must find that adverse effects to the environment and the public trust are minimal and will be mitigated to the extent possible; the resource affected must not be a rare resource; the public interest in the project must be greater than the public interest in the unavoidable degradation of the resource; and no feasible and prudent alternative can be available. The village's project did not meet these requirements, and the permit to the village was denied.

The departmental determination reported that there had been, and would continue to be, adverse effects to the Little Manistee River system, which is a cold water trout stream, if the dam were reconstructed, due to warmer water discharge and fluctuating discharge rates from the dam. In the absence of a dam, however, the report indicated that the fishery resource would improve because of, among other

factors, colder water temperatures.

The determination also pointed out that the Inland Lakes and Streams Act defines public trust as the paramount right of the public to navigate and fish in all inland lakes and streams which are navigable, and that it is the department's duty and responsibility to manage and protect a resource such as the Little Manistee River for the entire public. Further, in 1987, and again this year, the DNR proposed that the department and the village work together to explore a community plan that would enhance the recreational values of the river. One alternative that the DNR has proposed is a 5-acre off-water, or off-channel, pond, for which water would be diverted from the main river. Such a pond would still provide recreational opportunities for the community.