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BILL ANALYSIS

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Senate Bill 545 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Mark C. Jansen
Committee: Natural Resources and Environmental Affairs

Date Completed: 8-3-07

RATIONALE

The law requires an owner or operator of a municipal separate storm sewer system (MS4) to obtain a permit under the National Pollutant Discharge Elimination System (NPDES). This requirement stems from the Natural Resources and Environmental Protection Act (NREPA) and Department of Environmental Quality (DEQ) rules promulgated to comply with Federal requirements that states implement a program to regulate storm water discharges. Under NREPA, a municipality that applies for or has been issued a permit for storm water discharges must pay an annual permit fee based on its population. In some municipalities, a separate entity owns or operates the system, but the statute and DEQ rules require those municipalities to obtain permits and pay the fee. Recently, two townships brought a suit against the Department, claiming that they should not be required to obtain permits or pay the required fee because they did not actually own or operate MS4s. The court agreed, and issued a declaratory judgment in favor of the townships. (The litigation is described below, under **BACKGROUND**.) Thus, it has been suggested that NREPA should exempt a municipality that does not own or operate an MS4 from the permit and fee requirements.

CONTENT

The bill would amend Part 31 (Water Resources Protection) of the Natural Resources and Environmental Protection Act to do the following:

-- **Provide that a storm water discharge permit would not be required for a municipality that did not own or**

operate a separate storm sewer system.

-- **Prohibit the Department of Environmental Quality from collecting storm water discharge fees from a municipality that did not own or operate a separate storm sewer system.**

Part 31 requires the DEQ, until October 1, 2009, to collect storm water discharge fees from a municipality that applies for or has been issued storm water discharge permits, as follows:

- An annual fee of \$500 for a permit for a municipal separate storm sewer system, unless the permit is issued to a city, village, township, or county, or is a single permit authorization for municipal separate storm sewer systems in multiple locations statewide.
- An annual population-based fee for a permit for a municipal separate storm sewer system issued to a city, village, or township, ranging from \$500 for a local unit with 1,000 people or fewer to \$7,000 for a local unit with more than 100,000 people.
- An annual fee of \$3,000 for a permit for a municipal separate storm sewer system issued to a county.
- An annual fee for a single municipal separate storm sewer systems permit authorizing a State or Federal agency to operate municipal separate storm sewer systems in multiple locations statewide, determined in accordance with a memorandum of understanding between the agency and the DEQ and based on the needs projected by the DEQ to administer the permit.

Under Part 31, "storm water discharge permit" means a permit authorizing the discharge of wastewater or any other substance to surface waters of the State under the NPDES, pursuant to the Federal Clean Water Act or Part 31 and the rules and regulations promulgated under the Clean Water Act or Part 31.

"Municipality" means the State; a county, city, village, or township; or an agency or instrumentality of any of these entities.

"Municipal separate storm sewer system" means all separate storm sewers that are owned or operated by the United States or a state, city, village, township, county, district, association, or other public body created by or pursuant to State law, having jurisdiction over disposal of sewage, industrial waste, storm water, or other waste, that discharges to waters of the State. The term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

MCL 324.3118

BACKGROUND

In November 2006, the Circuit Court for Kalamazoo County issued its opinion in a case brought by Kalamazoo Township and Comstock Township against the DEQ, seeking a determination that they were not subject to Department rules regarding MS4s (File No. B06-1059 CZ). The plaintiff townships argued that they were not subject to the rules because they did not actually "own or operate" sewer systems as various statutes and rules specified. The DEQ countered that its rules provide that a township is subject to them if the township owns, operates, or *has jurisdiction over* a separate sewer storm system.

The Federal Clean Water Act (33 USC 1342) required the Administrator of the U.S. Environmental Protection Agency, by October 1, 1993, to issue regulations to designate storm water discharges to be regulated to protect water quality, and establish a comprehensive program to regulate

designated discharges, including requirements for state storm water management programs. The Administrator promulgated Federal regulations under the statute, including a definition of "municipal separate storm sewer". The definition refers to a conveyance or system of conveyances owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to state law) having jurisdiction over disposal of sewage, industrial waste, storm water, or other waste (40 CFR 122.26).

The Michigan Legislature subsequently enacted provisions of Part 31 of NREPA authorizing the DEQ to promulgate rules and take other action as necessary to comply with the Federal Water Pollution Control Act (which includes the Clean Water Act). The definition of "municipal separate storm sewer system" under Part 31 includes all separate storm sewers owned or operated by the U.S. or a state, city, village township, county, district, association, or other public body created by or pursuant to state law, having jurisdiction over disposal of sewage, industrial waste, storm water, or other waste.

The DEQ then promulgated rules for participating in the Federal program; the rules include the same definition of "municipal separate storm sewer system" (R 323.2013). The rules also require each city, village, or township with the power or authority to control storm water discharges to a regulated MS4 for which a national permit application is required to apply for a permit (R 323.2161).

In order to determine the validity of the DEQ's rules, the Court employed the following three-part test: 1) whether the rule was within the subject matter of the enabling statute; 2) whether it complied with the legislative intent underlying the enabling statute; and 3) whether it was arbitrary and capricious.

The Court determined that there was no genuine issue of material fact as to whether the townships *owned or operated* an MS4, and that both the statutes and rules were unambiguous in this regard. While the DEQ's rules did meet the three-part test, the Court found that the Department's interpretation of the rules exceeded the

unambiguous language. The Court's opinion states, "In any event, 'having jurisdiction' is not a separate basis for requiring a permit; it is part of the definition of an owner or operator of a system." The Court also noted that it disagreed with the DEQ's argument that the townships' previous participation in the permit program meant that they "operated" sewer systems.

Because it determined that the plaintiff townships were not subject to the rules and therefore not required to obtain a permit, the Court declined to address their second argument that the rules resulted in new unfunded mandates under the Headlee amendment to the Michigan Constitution.

The Court granted the townships' motion for summary disposition in November 2006. In January 2007, the Court issued a declaratory judgment stating, "MDEQ's interpretation and application of its storm water rules to those designated governmental units having the 'power or authority' to regulate storm water discharge but that are not an 'owner or operator' of a separate storm sewer system is an unauthorized and undelegated expansion of such storm water discharge rules and regulations by MDEQ and is accordingly invalid and unenforceable."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill simply would apply the Kalamazoo County Circuit Court's ruling statewide. Since the DEQ is reviewing past fee payments upon request by municipalities and has revised its permitting process to reflect the Court's decision, the bill should not present a burden to the Department.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill would cost the State an indeterminate amount of revenue from stormwater permit fees. Since the Department would be prohibited from collecting fees from certain municipalities that currently pay them, revenue would decrease. It is unknown which municipalities

would no longer require a permit. The result of the court decision issued in early 2007 is the re-evaluation of how stormwater permit fees are assessed. According to the Department, it is currently implementing an owner/operator basis for assessing these fees.

Fiscal Analyst: Jessica Runnels

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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.