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BILL



ANALYSIS

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Senate Bills 438 and 439 (as passed by the Senate)
Sponsor: Senator Randy Richardville (S.B. 438)
Senator Roger Kahn, M.D. (S.B. 439)
Committee: Economic Development and Regulatory Reform

Date Completed: 8-11-08

RATIONALE

Some people believe that overregulation is impeding economic development and job growth in Michigan. In particular, these concerns involve regulation under the Natural Resources and Environmental Protection Act (NREPA), which governs programs administered by the Departments of Environmental Quality, Natural Resources, and Agriculture. To ensure that programs under NREPA are administered effectively and fairly, and that permits are issued in a timely manner, various measures have been suggested. These include the random selection of facilities to inspect, and the performance of independent benchmark analysis or peer review of programs.

CONTENT

Senate Bill 438 would amend the Natural Resources and Environmental Protection Act to require any State department that performs routine inspections under the Act to use a "stratified random sampling process" to select people to inspect.

Senate Bill 439 would add Part 27 (Program Review) to NREPA to do the following:

- **Require State departments that administer programs under NREPA to hire someone to perform benchmark analyses or arrange for independent peer reviews of those programs.**
- **Require each department to complete two analyses or reviews by February 1, 2010, and then annually,**

until all programs were analyzed or reviewed.

- **Require the Department of Environmental Quality (DEQ) to complete an analysis or review of two specific programs by February 1, 2010.**
- **Identify factors that would have to be included in a benchmark analysis or peer review for the DEQ.**
- **Create the NREPA Program Review Panel to assist a person performing a benchmark analysis or peer review.**
- **Dissolve the Panel as of July 1, 2014.**

The bills are described in detail below.

Senate Bill 438

The bill would require the Department of Natural Resources (DNR), the DEQ, or any other State department that performs routine inspections under NREPA to use a stratified random sampling process to select people to inspect. That requirement would not apply to any of the following:

- An inspection performed in response to a complaint from a third party.
- An inspection performed because the DNR, DEQ, or other State department had evidence that a violation had occurred.
- A follow-up inspection to determine whether violations identified in a previous inspection had been corrected.

Each year, the DNR, DEQ, or any other State department that performs routine inspections under NREPA would have to submit to the Legislature a report on: the methods used to comply with the bill; the number of routine inspections conducted in compliance with the bill, and the number of inspections excluded from the inspection requirement, that the department performed during the previous year; and the location of the inspections.

"Stratified random sampling process" would mean a process that meets all of the following requirements:

- The population is divided into distinct nonoverlapping subgroups based on important characteristics.
- A sample then is selected from each subgroup through a process in which each person in that subgroup has an equal chance of being selected.
- The size of the sample from each subgroup is proportional to the size of the subgroup.

Senate Bill 439

Benchmark Analysis/Peer Review

The bill would require the DNR, DEQ, and any other State department that administers a program under NREPA to do one of the following for each of those programs:

- Hire a qualified, independent person through a request-for-proposal process to perform a benchmark analysis of the program.
- Arrange for an independent and external peer review of the program.

A person could not be selected to perform a benchmark analysis or peer review unless he or she had a proven ability to evaluate regulatory activities and make recommendations for improvement.

The DNR, DEQ, or other State department would have to complete two benchmark analyses or peer reviews in any combination by February 1, 2010, and each year after that until all programs administered by the department under NREPA were analyzed or reviewed.

Also, by February 1, 2010, the DEQ would have to complete a benchmark analysis or

peer review of both the remediation program under Part 201 (Environmental Remediation) of the Act and the National Pollutant Discharge Elimination System (NPDES) program under Part 31 (Water Resources Protection).

An analysis or peer review for the DEQ would have to include all of the following:

- A calculation of the DEQ's per-permit cost to process the permits and administer the program.
- A review of the timeliness of the process from receipt of a permit application to its approval or denial.
- A review of customer service practices.
- A review of measurable environmental impacts.
- For the Part 31 and Part 201 programs, a comparison of the DEQ's performance to that of other Great Lakes states.

NREPA Program Review Panel

The bill would create the NREPA Program Review Panel within the DEQ. The panel would have to assist a person performing a benchmark analysis or peer review under Part 27 in developing a framework for that work. The panel would consist of seven members, as follows:

- Two individuals appointed by the Senate Majority Leader, one representing permit holders and one representing business.
- Two individuals appointed by the Speaker of the House, one representing permit holders and one representing business.
- Three individuals appointed by the Governor, consisting of one DEQ employee, one DNR employee, and one person representing the general public.

Members would serve for terms of four years or until a successor was appointed. The appointing officer could remove a member of the panel for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or any other good cause.

The first meeting of the panel would have to be called by the member who was a DEQ employee. At that meeting, the panel would have to elect a chairperson and other officers it considered necessary or appropriate. After the first meeting, the

panel would have to meet at least quarterly, or more frequently at the call of the chairperson or as requested by two or more members. The panel would have to comply with the Open Meetings Act and the Freedom of Information Act.

Members of the panel would serve without compensation, but could be reimbursed for actual and necessary expenses incurred in the performance of their official duties as panel members.

The panel would be dissolved on July 1, 2014.

Proposed MCL 324.1505 (S.B. 438)
Proposed MCL 324.2701-324.2705 (S.B. 439)

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

When choosing a place to locate or expand, business executives consider the ease of obtaining permits and navigating regulatory procedures. In Michigan, however, a climate of overregulation is contributing to the State's reputation as being unfriendly toward business. The bills would address this in two ways.

By requiring the DEQ, DNR, and other State departments administering a program under NREPA to use random sampling when choosing people to inspect, Senate Bill 438 would ensure that no business or industry was singled out unfairly. This would send a positive message to job providers that they would be treated equitably in the inspection process. The bill would prevent departments from inspecting the same facilities repeatedly out of convenience, and would protect businesses from being targeted for speaking out against government action.

Under Senate Bill 439, the DEQ, DNR, and other State departments administering programs under NREPA would have to implement a system of independent peer review or benchmark analysis of those programs. Benchmarking is the routine comparison of administrative processes, practices, costs, and staffing within similar

organizations, to discover opportunities to improve services or lower costs. The departments would have to complete two benchmark analyses or peer reviews by February 1, 2010, and then annually. Also, by February 1, 2010, the DEQ would have to complete a benchmark analysis or peer review of the NPDES program, which can involve a lengthy permitting process, and the environmental remediation program. In addition, the bill would create a program review panel in the DEQ to assist someone performing a benchmark analysis or peer review. By requiring these independent evaluations of NREPA programs, the bill would ensure that the programs meet their goals and that environmental regulations serve a relevant purpose.

Opposing Argument

Senate Bill 438 is a solution in search of a problem. There is no evidence that the DEQ or other State departments are inappropriately allocating resources to inspections or unfairly selecting facilities to inspect. Inspections are a form of a search and must be conducted neutrally or for probable cause. When choosing sites to inspect and performing inspections, departments balance the right to privacy with the need to enforce environmental law. They also consider appropriate factors, such as the ability to work with a facility afterward, planning targets, compliance history, and whether a high-impact activity is involved—complexities that random sampling fails to consider.

Furthermore, for some programs administered under NREPA, the bill would conflict with existing requirements under State or Federal law that specify activities to be inspected and the frequency or conditions of inspections. In the case of federally delegated programs, failure to comply with Federal law, guidance, or grant requirements could jeopardize the State's authority to administer the programs.

The bill's inspection and reporting requirements also would be resource-intensive, inefficient, and costly. Complying with these requirements would divert resources from operations that need attention and would limit the State's ability to respond in a timely manner to potential threats to health, safety, or the environment.

In addition, the use of "stratified random sampling" inspections would interfere with the DEQ's ability to inspect sites or facilities based on their geographic proximity, which increases efficiency and reduces costs by limiting the number of trips to a distant site. A random approach likely would require much more travel time and expense.

Opposing Argument

In attempting to structure a common method and procedure to evaluate environmental programs, Senate Bill 439 fails to recognize the differences between the programs, which could lead to inaccurate and uninformative evaluations.

The bill would require a benchmark analysis or peer review of a DEQ program to focus on permitting and "customer service", but not all programs administered by the DEQ include these functions. In fact, one of the programs singled out by the bill, Part 201 environmental remediation, does not involve permitting. Even programs that do must be evaluated on the basis of other important activities, such as compliance, inspections, and enforcement, to ensure that the regulated parties meet their legal responsibilities.

Although the bill would create a program review panel to assist with benchmark analyses and peer reviews, this body would be skewed toward regulated entities: Two of the appointees would have to represent "business" and two would have to be permit holders.

Collecting the required information and participating in peer review activities would impose new and significant costs on the DEQ. These expenses would detract from actual program performance and could not be justified during a time of severe constraints on the resources available to the Department to fulfill its basic functions. The DEQ already does engage in specific program reviews as warranted. The new evaluation methodology also could duplicate efforts of the Auditor General, who conducts performance audits as well as financial audits.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bills would result in additional administrative workload for State departments. A specific cost estimate is not available.

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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.