

Legislative Analysis



REVISIONS TO NREPA

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House Bill 4042 (Substitute H-1)

House Bill 4043 (Substitute H-2)

Sponsor: Rep. Greg McMaster

Committee: Regulatory Reform

First Analysis (5-11-11)

BRIEF SUMMARY: House Bill 4042 would revise the information that certain state departments must include when particular permit applications are denied. House Bill 4043 would require the department or local governmental unit which issued a permit under NREPA to offer to meet with a permittee prior to initiating a civil enforcement action.

FISCAL IMPACT: House Bills 4042 and 4043 would have an indeterminate fiscal impact on the Department of Environmental Quality. Any increased costs to the department would be related to additional administrative workload from the bills' provisions that the denial of a permit shall include the scientific information related to the denial and that a civil enforcement action could not be initiated without an offer to meet with the permittee, except under certain circumstances. Similar costs would likely apply to other departments and entities that would be subject to the bills' requirements as well.

THE APPARENT PROBLEM:

Critics of the permitting process under the Departments of Natural Resources and Environmental Quality have long complained that permit denials appear at times to be arbitrary, leading some to call for more transparency and accountability in the process.

As an example, testimony was given in committee regarding one business' attempt to obtain a permit to conduct underwater logging to collect abandoned logs resting on the bottoms of some Michigan lakes, streams, and rivers. Allegedly, the permit denial did not contain any scientific reasoning for not granting the permit; therefore, if the denial was based in whole or in part based on science, appealing the denial was made more difficult when the exact scientific basis for the denial was not known.

In another issue related to permit holders, it has been suggested that before initiating a civil enforcement action, the governmental entity that issued the permit be required to initiate a meeting between agency staff and the permit holder to see if the issue could be resolved without going through a formal court process. Some feel that this type of face-to-face approach could resolve issues more quickly, more efficiently, avoid court costs for both parties, and diminish the "us" versus "them" feelings between permit holders and governmental regulators.

THE CONTENT OF THE BILLS:

House Bill 4042 would amend Article 1, Part 13, entitled "Permits," of NREPA (324.1307). Currently, a denial of an application for a permit must include an explanation of the reasons for the denial and make a specific reference to provisions of NREPA or rules promulgated under it providing the basis for the denial.

Instead, the bill would require that the denial – to the extent practical – state with specificity all of the reasons for the denial, including both of the following:

- A specific reference to provisions of NREPA or rules promulgated under it providing the basis for the denial.
- To the extent applicable, the scientific information providing the basis for the denial.

(Section 1301 of the act defines "permit", for the purposes of Part 13, as a permit or operating license required by certain sections of the act or rules, and they are listed in the provision. "Department" is defined as the department, agency, or officer authorized by the act to approve or deny an application for a particular permit.

Thus, the bill would apply to permit application denials by multiple departments, including the Department of Natural Resources, the Department of Environmental Quality, the Department of Agriculture, and the Department of Transportation. In addition, the definition of "permit" also includes one license, a local soil erosion and sedimentation control permit, issued by a county enforcing agency or municipal enforcing agency. It would appear that the bill would impose the same requirement on the local unit.)

House Bill 4043 would add a new section, entitled "Enforcement," to Article 1, Part 15 of NREPA (MCL 324.1511). Except as exempted, and notwithstanding any other provision of the act, the bill would require the department that issued a permit to contact a permittee (the person with the permit) before initiating a civil enforcement action under the act and extend an offer for departmental staff to meet with the person to discuss the potential civil enforcement action and potential resolution of the issue. If the permittee agrees to meet with the department, the department could not initiate a civil enforcement action until after the meeting was held, unless the meeting was not held within a reasonable time period, as determined by the department.

The requirement to meet with a permittee prior to initiating a civil enforcement action would not apply in the following circumstances:

- The civil enforcement action is a civil infraction action.
- The department determined that the violation that is the subject of the civil enforcement action constitutes an imminent and substantial endangerment of the public health, safety, or welfare or of the environment.

"Department" is defined to mean the department, agency, or officer authorized by NREPA to approve or deny a permit application.

"Permit" is defined to mean a permit or operating license issued under NREPA.

ARGUMENTS:

For:

The bills attempt to make the issuance and regulation of certain permits under the Natural Resources and Environmental Act more effective, efficient, and cost effective. If a permit application under Section 1301 of the act is denied, House Bill 4042 would require the permitting agency to include in the denial any scientific information used as a basis to deny the application. Whether choosing to resubmit the application with additional information, or to appeal the denial through the administrative hearing process, it is important to know in detail the "why" of a denial. First, it could reveal that with better or different information supplied by the applicant, the concerns of the permitting agency could be satisfied and the permit issued without having to go through the entire appeals process – resulting in a cost savings to all concerned. In addition, it would dispel the notion that certain businesses or individuals are being arbitrarily targeted by bureaucrats based on personal biases.

Requiring permitting agencies under House Bill 4043 to reach out to permittees regarding violations before initiating a civil enforcement action would have the potential to reduce agency costs relating to enforcement actions and also foster a feeling of cooperation between regulators and the regulated that many feel is currently lacking. Some permit holders feel that if they could just have a face-to-face meeting with agency staff, where questions could be asked and information shared, that issues leading to the enforcement action could be addressed more quickly and compliance achieved without the costs to the state of filing a court action to force compliance or to the permittee in mounting a defense to the action.

Against:

The definition of "permit" contained in House Bill 4043 as reported from committee would apply to hundreds of different types of permits, some of which, like hunting permits, encompass thousands of permittees. To require meetings with staff before an enforcement action could go forward could overwhelm the staff of the issuing agencies.

Response:

First, the bill as reported from committee would screen out actions needing an immediate response due to an imminent health hazard. The bill would also screen out permit categories for which a violation is a misdemeanor or felony and any enforcement action that involved a civil infraction. According to the Department of Environmental Quality, the H-2 Substitute would thus narrow the categories of permits and licenses that would be subject to the meeting requirements.

POSITIONS:

The Michigan Chamber of Commerce indicated support for the bills. (3-23-11)

The Michigan Environmental Council indicated support for the bills. (3-23-11)

The Department of Environmental Quality indicated support for the bills. (3-23-11)

The Michigan Manufacturers Association indicated support for the bills. (3-23-11)

The Detroit Chamber of Commerce indicated support for the bills. (3-23-11)

The Michigan Chemistry Council indicated support for the bills. (3-9-11)

The National Federation of Independent Businesses indicated support for the bills. (3-9-11)

Maritime Heritage Consulting indicated support for the bills. (3-9-11)

Small Business Association of Michigan indicated support for the bills. (3-9-11)

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■ 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.