

Legislative Analysis



REVISIONS TO NREPA

Mary Ann Cleary, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4042 as enrolled
Public Act 236 of 2011

House Bill 4043 as enrolled
Public Act 237 of 2011
Sponsor: Rep. Greg McMaster

House Committee: Regulatory Reform
Senate Committee: Economic Development

Second Analysis (4-8-13)

BRIEF SUMMARY: The bills both amend the Natural Resources and Environmental Protection Act, known as NREPA. House Bill 4042 would revise the information that certain state departments must include when particular permit applications are denied and to require a department to focus its resources on any type of permit for which the department fails to process 10 percent or more of permit applications within the required processing time. House Bill 4043 would require the department or local governmental unit that 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 a business that attempted 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 beginning 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:

The bills both amend the Natural Resources and Environmental Protection Act, known as NREPA

House Bill 4042 would amend Article 1, Part 13, entitled "Permits," of NREPA (324.1307) to address concerns with permit denials and any backlogs in processing permit or license applications.

Permit Denials

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.

The bill would require instead 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. See MCL 324.1301 for a complete list and the processing deadlines for each type of permit or license. "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.)

Application Processing Deadlines

Currently, the act requires the Department of Natural Resources and the Department of Environmental Quality, or other entities when appropriate, to grant or deny administratively complete applications for various permits and licenses issued under the act *in a timely manner*. The review deadline varies depending on the license or permit for which an application has been made. If an application is not approved or denied by the required time, the department responsible for processing the application must pay the applicant an amount equal to 15 percent of the greater of the amount of the application fee or the amount of the first periodic charge of an assessment or other fee for that permit if an assessment or other fee is charged for that permit on an annual or other periodic basis.

The above penalty applies to all permits listed in Section 1301 except for those issued under Section 11509 (solid waste disposal area construction permit) and Section 11512 (solid waste disposal area operating license). The act also exempts Section 30307, which pertains to hearings for wetlands permits and permits issued under local ordinances concerning wetlands activities. House Bill 4042 would delete the reference to Section 30307 and replace it with a reference to Section 30304, which provides a state permit for dredging, filling, or other activity in a wetland. The bill would also add an exception for permits issued under Section 32603 (submerged log removal from Great Lakes bottomlands).

Moreover, the bill specifies that if the department fails to meet the processing deadlines with respect to 10 percent or more of the applications for a particular type of permit received during a quarter of the state fiscal year, the department would have to immediately devote resources from that program to eliminate any backlog and satisfy the processing requirements with respect to new applications for that type of permit within the next fiscal year.

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 an applicant chooses 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. The bill should also help departments to identify more quickly when a backlog in the permitting process for a particular type of permit is occurring and to channel resources to that area immediately before the backlog gets out of hand.

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. According to the Department of Environmental Quality, only a narrow category of permits and licenses would be subject to the meeting requirements. The bill would not apply to actions needing an immediate response due to an imminent health hazard or to permit categories for which a violation is a misdemeanor or felony or any enforcement action that involved a civil infraction.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Viola Bay Wild

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